

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 526.

FORGED STEEL WHEEL COMPANY, PETITIONER,

vs.

C. G. LEWELLYN, COLLECTOR OF INTERNAL REVENUE
FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

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a

Certified Copy.

Transcript of Record.

In the United States Circuit Court of Appeals for the Third Circuit,
March Term, 1919.

No. 2462.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third
District of Pennsylvania, Plaintiff in Error,

v.

FORGED STEEL WHEEL COMPANY, a Corporation Organized and Ex-
isting Under the Laws of the State of Pennsylvania, Defendant in
Error.

In Error to the District Court of the United States for the Western
District of Pennsylvania at No. 2016, November Term, 1918.

1 In the United States Circuit Court of Appeals for the Third
Circuit, March Term, 1919.

No. 2462.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third
District of Pennsylvania, Plaintiff in Error,

vs.

FORGED STEEL WHEEL COMPANY, a Corporation Organized and Ex-
isting Under the Laws of the State of Pennsylvania, Defendant in
Error.

Error to the District Court of the United States for the Western Dis-
trict of Pennsylvania at No. 2016, November Term, 1918.

Appearances:

Gordon & Smith, James McKirdy, Attorneys for Plaintiff.
R. L. Crawford, United States Attorney and Attorney for
Defendant.
B. B. McGinnis, Special Assistant United States Attorney
and Attorney for Defendant.

2 Among the rolls, records and judicial proceedings had in
the District Court of the United States for the Western Dis-
trict of Pennsylvania at No. 2016 November Term, 1918, may be
found the following words and figures, to wit:

Docket Entries.

June 29, 1918, Praecept for Summons and Plaintiff's Statement filed.

June 29, 1918, Summons in assumpsit issued, returnable to first Monday of July, next.

July 1, 1918, Writ returned served on C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, by handing to and leaving a true and attested copy of thercof with C. G. Lewellyn, personally, at Pittsburgh, Pa., June 29, 1918.

July 1, 1918, Affidavit attached to Writ shows service copy statement on Defendant June 29, 1918, by Nicholas L. Bogan.

Oct. 4, 1918, Affidavit of Defense filed.

Oct. 4, 1918, Praecept for issue filed.

Dec. 19, 1918, Deposition of W. F. Battin filed.

Dec. 20, 1918, Jury sworn, ent.

Dec. 20, 1918, Trial adjourned to Jan. 2, 1919.

Jan. 2, 1919, Trial proceeds.

Jan. 3, 1919, Trial proceeds.

Jan. 3, 1919, Plaintiff's witnesses sworn (6).

Jan. 3, 1919, Under binding instructions the jury returns a verdict in favor of Plaintiff in the sum of \$246,920.18, principal, and \$16,337.88 interest, or an aggregate of \$263,258.06.

Jan. 3, 1919, Defendant's points filed.

3 Jan. 3, 1919, Plaintiff's points filed.

Jan. 3, 1919, Memorandum of Trial filed.

Jan. 7, 1919, Motion for a new trial filed by leave of Court and entered.

March 1, 1919, Opinion filed and entered refusing motion for a new trial.

Now, March 1st, 1919, Judgment is hereby entered on the verdict in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of the U. S. Internal Revenue for the 23rd District of Pa., in the sum of two hundred and sixty-three thousand two hundred fifty-eight & 06/100 (\$263,258.06) Dollars.

J. WOOD CLARK.

Clerk.

March 22, 1919, Petition for writ of error and order allowing same filed and entered.

March 22, 1919, Assignments of Error.

March 22, 1919, Bill of exceptions signed, sealed, allowed and filed.

March 25, 1919, Praecept re contents of record sur Writ of Error filed.

March 29, 1919, Writ of Error issued.

March 29, 1919, Citation awarded and issued.

March 29, 1919, Service of citation accepted by Gordon & Smith.

4

Praecept and Statement of Claim.

Praecept.

To J. Wood Clark, Esq.,
Clerk of said Court:

Issue summons in assumpsit in this case, returnable next return day.

GORDON & SMITH,
Attorneys for Plaintiff.

Statement of Claim.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Forged Steel Wheel Company, a corporation of the State of Pennsylvania, having its principal office and place of business in the City of Pittsburgh, in the Western District of Pennsylvania, plaintiff in this case, brings suit against C. G. Lewellyn, Collector of the United States Internal Revenue for the 23rd District of the State of Pennsylvania, and a resident of the City of Uniontown in the Western District of Pennsylvania, and says that the said defendant is justly and truly indebted to it in the sum of \$246,920.18, with interest from the 27th day of November, 1917, upon the following cause of action:

1. Forged Steel Wheel Company, the plaintiff in this case, is a corporation duly organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Allegheny County, Pennsylvania, and is a citizen and resident of the State of Pennsylvania and of the Western District thereof.

2. C. G. Lewellyn, defendant in this case, is a citizen of the State of Pennsylvania and a resident of the City of Uniontown in the Western District of said State of Pennsylvania, and at all times hereinafter mentioned was and is now the Collector of the United States

Internal Revenue for the 23rd District of the State of Pennsylvania. Said Internal Revenue District comprises within its boundaries the places where the plaintiff's principal office and the manufactory hereinafter mentioned are located.

3. At all times during the year 1916 the plaintiff was and is now engaged in the manufacture and sale of steel forgings. Plaintiff's said manufactory is located at the City of Butler, in the State of Pennsylvania and the Western District thereof.

4. In the year 1917, to wit, on or about the 31st day of March, the plaintiff, at the instance of the defendant, made a return of profits earned by it in the year 1916 in the manufacture of steel forgings, which were subsequently used by other persons in the manufacture of projectiles. A true and correct copy of said return is attached hereto and marked "Exhibit A."

5. Subsequently, to wit, on or about the 30th day of October, 1917, the defendant levied and imposed upon the plaintiff a tax upon its 1916 profits referred to and as shown in the return mentioned in the preceding paragraph, under the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: "An Act to increase the revenue and for other purposes," commonly known as the Munition Manufacturer's Tax Law, amounting to \$107,846.84, which was thereafter, to wit, on or about the 27th day of November, 1917, paid by the Forged Steel Wheel Company.

6. Subsequently, the accounts of the plaintiff company were audited by Examiners of the Internal Revenue Department. Said Examiners suggested that the return which had been made by the plaintiff of its profits for the year 1916 was improper in that it did not include profits which had been made by the plaintiff in the manufacture of steel before the forging process began and that it also failed to include profits made in the manufacture of steel furnished to sub-contractors, who did the forging work on some of these products, and in that plaintiff did not include profits made by it on forgings which had been purchased from others, where none of the work thereon had been done or performed by the plaintiff.

7. The plaintiff thereafter, at the request of said Examiners, made, under protest, a supplemental return setting forth the facts mentioned in the preceding paragraph with reference to said matters. A true and correct copy of said supplemental return is attached hereto and marked "Exhibit B."

8. Subsequently, to wit, on or about the 30th day of October, 1917, the defendant, as Collector of the United States Internal Revenue for the 23rd District of Pennsylvania, claiming to act in pursuance of the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: "An Act to increase the revenue and for other purposes," commonly known as the Munition Manufacturer's Tax Law, assessed upon and demanded of the plaintiff the sum of \$246,920.18, which the defendant claimed

to be due and payable by the plaintiff as the munition manufacturer's tax on the profits made by the plaintiff in the year 1916 in addition to the sum of \$107,846.84, which had already been paid by the plaintiff. A true and correct copy of said assessment is attached hereto and marked "Exhibit C." The defendant threatened to enforce the payment of said tax, together with the penalties and interest as provided in the Act, by distress and sale of the plaintiff's property, and thereupon the plaintiff, solely to avoid the imposition of the penalties and interest and the threatened distress and sale, and under compulsion, duress, coercion and protest, paid to the defendant, as such collector, on or about the 27th day of November, 1917, the amount of said assessment, to wit, the sum of \$246,920.18 (a true and correct copy of defendant's receipt therefor is hereto attached and marked "Exhibit D"), and at the same time protested in writing that no tax was due from the plaintiff and that the defendant was without authority to exact and collect the same and stated that plaintiff paid the same under duress and compulsion and that suit would be brought to recover the same. A true and correct copy of said written protest is hereto attached and marked "Exhibit E."

9. Subsequently, to wit, on or about the 22nd day of December, 1917, the plaintiff duly took an appeal from the action of the
8 said Collector to the Commissioner of Internal Revenue and demanded repayment of said tax in accordance with the law and regulations and rules of the Treasury Department. Said appeal was duly perfected and filed with the Commissioner of Internal Revenue on or about the said 22nd day of December, 1917. A true and correct copy of said appeal is hereto attached and marked "Exhibit F."

10. Subsequently, to wit, on or about the 30th day of April, 1918, the Commissioner of Internal Revenue disposed of said appeal finally and rejected and dismissed the same. A true and correct copy of the Commissioner's order disposing of the same is hereto attached and marked "Exhibit G."

11. No part of the said sum of \$246,920.18 has been repaid to the plaintiff and the whole amount thereof, with interest thereon from the 27th day of November, 1917, remains due and owing from the defendant to the plaintiff.

12. This is a suit of a civil nature at common law, and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for Internal Revenue.

13. Plaintiff avers that the tax levied and assessed, and paid as aforesaid, was a tax that the defendant levied under the pretended authority of section 301 of the said Act of Congress approved September 8, 1916, which said section imposes a tax upon every person manufacturing projectiles, or any part of any projectile. Plaintiff avers that it did not during the year 1916 manu-

facture any projectiles, or any part or parts of any projectiles, and that the whole of said tax so levied, imposed and extorted by the defendant was and is illegal and void.

14. Forged Steel Wheel Company is a subsidiary corporation of the Standard Steel Car Company. The Standard Steel Car Company is engaged in the business of manufacturing steel railroad cars and the primary business of the Forged Steel Wheel Company was and is to furnish steel wheels and other steel forgings and rolled steel materials to the Standard Steel Car Company. It also supplies these same commercial commodities to others. Its business begins with the manufacture of steel by the open hearth process from raw materials, consisting mainly of pig iron and scrap. The steel when in a molten state is cast into ingots. The ingots are then reheated and are rolled into either billets or slabs. The billets are made of different sizes and weights to suit the size desired for the final rolled product and the capacity of the mill in which they are to be rolled and are reheated before final rolling. The company has two finishing mills, one a 12-inch mill and one an 18-inch mill, both of them capable of rolling rounds, flats and commercial shapes. During the year 1916 various persons or corporations who were engaged in the manufacture of projectiles in the United States contracted with the plaintiff to purchase from it certain steel, which was the raw material used by them in said manufacture, and the plaintiff contracted to supply the same in the shape of steel forgings, which were adapted as to shape, weight and character of steel to the purchasers' requirements. The ma-

10 terials so furnished by the plaintiff consisted of steel rounds from 4½ to 6½ inches in diameter and 14 inches long, which had been put through two forgings and pressing operations to bring them to a shape in which they could be conveniently used for manufacture into a part of a projectile. The plaintiff secured contracts for more materials than it could furnish and the forgings that were eventually furnished by it to said projectile manufacturers were to some extent manufactured from steel rounds which plaintiff had itself made and to some extent from steel which it had purchased from other steel manufacturers, and the forging was to some extent done by the plaintiff and to some extent by other persons for it. That is to say, in some cases plaintiff made the steel, rolled it into rounds, and did the forging; in other cases plaintiff made the steel rounds and a third party did the forging, and in other cases plaintiff did no manufacturing at all, that is, plaintiff purchased the steel rounds and a third party did the forging, so that the entire manufacturing process was done by others, and neither the complete forgings nor any of the materials out of which they were made have been in plaintiff's possession.

For the calendar year ending December 31st, 1916, the Forged Steel Wheel Company returned to the Federal Internal Revenue Bureau on form 1089, the gross amount of income received or accrued from the sale of such forgings. Under the erroneous assumption that said forgings were parts of munitions under Title III of the Act of September 8th, 1916, and therefore liable to the Muni-

tion Manufacturer's Tax, the gross amount of income so reported as received or accrued amounted to the sum of \$7,738,013.49.

11 In making its said return it deducted therefrom the sum of \$3,184,048.56, being its estimate of the cost of raw materials entering into the manufacture of such forgings.

Upon this basis the company assumed that the total net profits upon which it erroneously assumed that a munition tax of 12½% was owing, amounted to the sum of \$862,774.71, upon which a tax of \$107,846.84 was assessed and duly paid (but, by oversight, not under protest), as aforesaid.

The officers of the United States Internal Revenue Bureau being dissatisfied with this return, made an examination of the books of the Forged Steel Wheel Company and directed that an additional return be made, this return to show as the cost of raw material entering into the manufacture of said articles or parts, the sum of \$1,208,687.09, instead of the aforesaid sum of \$3,184,048.56, as first reported. This made a difference of \$1,975,361.47, which the Federal Government insisted and claimed constituted additional profits upon which a Federal tax of 12½% should be paid, amounting to the sum of \$246,920.18, which as aforesaid was illegally assessed and paid under protest by said company as aforesaid.

This amount of \$1,975,361.47 is made up of two items, namely, the sum of \$1,220,740.59 and \$754,620.88.

The first item (\$1,220,740.59) represents the profit on 94,141,622 pounds of steel which were delivered to the Standard Steel Car Company and by that company converted into forgings as aforesaid. Of this steel, 43,951,174 pounds were manufactured by the Forged Steel Wheel Company at a profit of \$567,140.67. Of said steel de-

12 delivered to the Standard Steel Car Company, 50,190,448 pounds were purchased from other companies and delivered to the Standard Steel Car Company at a steel broker's profit of \$653,599.92.

The profit to the Standard Steel Car Company in said operation of forging was erroneously returned by the Standard Steel Car Company as a munition manufacturer's tax and the tax thereon paid as hereinbefore stated.

The said sum of \$1,220,740.59, made up of the said sum of \$567,140.67 and \$653,599.92, does not represent any profit from forging or any process of munition manufacture but is profit accruing to the Forged Steel Wheel Company on said steel by it furnished to the said Standard Steel Car Company.

The other item, the sum of \$754,620.88, represents the difference between the actual market price of steel bars and the actual cost to the Forged Steel Wheel Company of the steel bars converted into forgings. This does not in any manner represent a profit on the manufacture of munitions or any part of munitions or any profit from the forging of steel bars, but represents the difference between the actual cost to the Forged Steel Wheel Company of these bars, and the amount representing the market value at which they were charged against the contracts. In other words, if the Forged Steel Wheel Company had sold in the open market the same amount

of steel bars, it would have received for them a market price equal to the amount it cost the Forged Steel Wheel Company to manufacture the bars, plus the said additional sum of \$754,620.88.

Without waiving or limiting the demand for the repayment of the whole of the tax, separate claim is hereby made for so much thereof as is based upon each of the foregoing items.

13 15. Plaintiff avers that the provisions of the Act of Congress hereinbefore referred to did not apply to or levy a munition tax upon manufacturing of the character performed by it as hereinbefore set forth or upon the profits made in the manufacture of or dealing in the articles or materials hereinbefore referred to in this statement; and that the levy and exaction of the whole of said tax, and each and every part thereof, by the said defendant as hereinbefore set forth were illegal, oppressive and in violation of law, and that the same was extorted from the plaintiff by duress and threats.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$246,920.18, with interest thereon from the 27th day of November, 1917, together with costs and disbursements of this action.

GORDON & SMITH,
Attorneys for Plaintiff.

14 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

John M. Hansen being duly sworn according to law, deposes and says that he is the president of the Forged Steel Wheel Company, the plaintiff in this case, and its agent in this behalf, and that the allegations contained in the foregoing statement of claim, so far as they are made of his own knowledge, are true, and so far as they are made from the information derived from others, are true as he is informed and believes and expects to be able to prove on the trial of this cause.

JOHN M. HANSEN.

Sworn to and subscribed before me this 29th day of June, 1918.

G. R. LANDERS,
Notary Public.

[SEAL.]

My commission expires March 9, 1919.

15

EXHIBIT "A."

Form No. 1089.

To Be Filled in By Internal Revenue Bureau.

Audited by.....

U. S. Internal Revenue.

Munitions Manufacturers' Tax.

The Penalty

For failure to have this return in the hands of the Collector of Internal Revenue on or before March 1 is a fine of \$10,000 or imprisonment not exceeding one year, or both, and an additional assessment of 50 per cent. of the tax.

Return of Annual Net Profits.

(Title III, Act of September 8, 1916, as amended.)

To Be Filled in by Collector.

Collection District.....

Assessment List....., 191

Page..... Line.....

Important.

All information on this form should be read carefully before inserting figures.

16 Return of Net Profits or Income for the Calendar Year Ended December 31, 1916, by Forged Steel Wheel Company, Manufacturing Steel Slabs, Billets, Plates, Bars, Shapes and Forged Wheels, and located at Butler, Penna.

1. Total amount of capital employed in the business or properties and used in the manufacture of munitions or parts thereof.....\$
2. Total amount of debts or loans (interest-bearing) contracted to meet the needs of such business.....\$
3. Gross amount of income received or accrued from the sale or disposition of munitions or parts thereof manufactured in the United States.....\$7,738,013.49

4.	Cost of raw materials entering into the manufacture of such articles or parts	\$3,184,048.56
5.	Total amount of expenses of operation and maintenance relating to the business or properties.....	3,504,206.08
6.	Amount of interest paid within the year on debts or loans described in Item 2.....	None
17	7. Taxes of all kinds paid within the year with respect to the business or properties relating to the manufacture of munitions or parts thereof	15,710.03
8.	Losses actually sustained and charged off within the year in connection with the business, and not compensated for by insurance or otherwise	None
9.	Depreciation on property used in, but not specially constructed or installed, in this business.....	171,274.11
10.	Amount apportioned to the year for amortization of the cost of buildings and machinery specially constructed or installed for use in manufacture of munitions or parts thereof.....	None
	Total deductions, items 4 to 10, inclusive.....	6,875,238.78
11.	Total net profits upon which tax at 10 per cent is computed	862,774.71
12.	Total amount of tax to be assessed.....	\$107,845.84
18	We, J. M. Hansen, President, and T. H. Gillespie, Treasurer, respectively, of Forged Steel Wheel Company, whose return of net profits or income from the manufacture and sale or disposition of munitions or parts thereof is hereinbefore set out, being severally duly sworn, each for himself, depose(s) and say(s) that the facts and figures set out in the foregoing report or in any statement attached hereto, are to his best knowledge and belief, true and correct in each and every item and particular.	

J. M. HANSEN,
President.
T. H. GILLESPIE,
Treasurer.

Subscribed and sworn to before me this 31st day of March, 1917.

G. R. LANDERS,
Notary Public.

[SEAL.]

My Commission Expires March 19, 1919.

19

General Instructions.

Person.

The term "person" as used in these instructions will comprehend every individual, partnership, corporation, or association engaged in manufacturing in the United States any articles or parts thereof enumerated in Section 301, Title III, of the Act of Congress approved September 8, 1916, as amended by the Act of October 3, 1917. The tax imposed by this Title is in addition to the income tax imposed by Title I of the same Act, and is an amount equivalent to 10 per cent upon the entire net profits actually received or accrued for each calendar year from the sale or disposition of such articles named as are manufactured within the United States.

Any Part Thereof.

Any part of any of the articles mentioned in paragraphs (b) to (e), inclusive, of Section 301 as used in the section referred to is an article relatively complete within itself and designed or manufactured for the special purpose of being used as a competent part of a munition, and which, by reason of its peculiar characteristic, loses its identity as a stock or commercial commodity, and which without further treatment can not be used for any purpose other than that for which it was designed. (See Art. 13 of Regulations 39.)

Effective Date of Title.

20 The effective date of this Title is January 1, 1916, and every person engaged in the manufacture and sale of any of the articles or parts thereof enumerated in Section 301 of this Title is subject to the tax thereby imposed, computed upon the entire net profits received or accrued during the year 1916 and each calendar year thereafter, from the sale or disposition of such articles as are manufactured in the United States.

Return to be Made When.

Each person coming within the terms of this Title is required to make a return of annual net profits or income in the manner and form prescribed in the foregoing blank, which return, when properly prepared and sworn to, shall be filed with the Collector of Internal Revenue of the District in which such person has his principal office or place of business, on or before March 1 next following the year for which the return is made or in which the net profits were received

or accrued. Failure to file the return within the prescribed time subjects the delinquent to a specific penalty of not more than \$10,000 or imprisonment not exceeding one year, or both, and to an assessment of 50 per cent additional tax.

Signatures and Verification.

The return must be signed and sworn to before an officer qualified to administer an oath, and the seal of such officer, if required to have a seal, must be impressed upon the form in the space provided therefor. If the business is carried on by an individual, the return shall be signed and sworn to by him; if by a partnership, 21 then by two of the members of the firm; if by a corporation or association, then by two of the principal officers of such organization.

When the Tax Shall be Assessed and Paid.

The tax imposed by this Title shall be assessed by the Commissioner of Internal Revenue as soon as practicable after the receipt of the return, and the taxable person shall be notified of the amount of such tax and the same shall be paid to the Collector of Internal Revenue with whom the return was filed, on or before 30 days from the date of such notice.

Authority of Commissioner of Internal Revenue.

The Commissioner of Internal Revenue is authorized by this Title, in person or by an agent, to examine the books of account and records of any person subject to the tax, or who he has reason to believe is subject to the tax, for the purpose of verifying any return made, or to make an investigation to determine the amount of profits received and accrued to such person, in case no return is made, and to assess the tax accordingly and proceed to collect the same in the same manner as if a return of the net profits discovered, had been made.

The gross income contemplated by the Title and to be reported in this return is the gross amount received by or accrued to a taxable person during the year from the sale or disposition of such articles named in Section 301 of this Title as are manufactured within the 22 United State, profits received and accrued from the manufacturer and sale of blasting powder and dynamite, and from the manufacture of cartridges, loaded and unloaded, caps or primers, used for industrial purposes being excepted, and income received during the year 1916 from the sale and delivery of such articles, under contracts fully performed prior to January 1, 1916, being also excepted from liability to this tax. (See Act. 10, Regulations 39.)

As used in this Title and as applied to the manufacture of "parts thereof," raw materials are held to be any crude or elemental products or substances necessary to the manufacture of parts, and which,

without the application of skill or science, can not become component parts or elements in the finished article or unit. As applied to the manufacture of completed munitions, raw materials will include not only such crude products and elemental substances but all essential parts as well. The cost of raw materials authorized as a deduction will not include any expenditure made for raw materials used in the manufacture of articles other than munitions or parts thereof, in cases where the manufacture of such munitions or parts is carried on in connection with any other business. (See Art. 15, Regulations 39.)

Running or General Expenses.

Expenditures of this character constitute an allowable deduction to the extent that such expenses are incurred and paid during the year in the manufacture of articles the profits from the sale of which are included in the gross amount of income returned. Such ex-

23 penses will include expenditures for rent, repairs, and main-
tenance, heat, light, power, insurance, management, salaries, and wages. In cases where other business is carried on in connection with the manufacture and sale of munitions or parts thereof, and the running expenses of the person making the return cover those incurred in the operation of the entire business and can not be segregated from those incurred in connection with other business, the expenses deductible for the purpose of this tax are such a portion of the entire expense as the gross income received or accrued from the manufacture and sale of war munitions or parts thereof is a portion of the entire gross income received or accrued from such entire manufacturing business. The cost of new buildings, new machinery, or equipment should be charged to capital account to be taken care of through the depreciation or amortization account.

Interest Paid.

The amount deductible on this account is the amount of interest actually paid within the year on debts or loans contracted to meet the needs of the business of manufacturing munitions or parts thereof and the proceeds of which were actually used to meet such needs. This deduction must not include any interest paid on debts or loans the proceeds of which were used to meet the needs of any other business in which the manufacturer may be engaged. (See Art. 17, Regulations 39.)

Taxes Paid.

The taxes deductible under this Title are those taxes of all kinds which were actually paid during the year and which were im-
24 posed with respect to the business or property relating to or used in the manufacture of articles the profit from which is taxable under this Title. If the taxes paid by a manufacturer of munitions or parts thereof are not segregated from those paid with

respect to other business or property they will be apportioned in accordance with the rule hereinbefore set out for apportioning running expenses, and the deduction from the gross income received or accrued from the manufacture and sale of munitions or parts will be made accordingly.

Losses Sustained.

The amount to be deducted on this account is the amount of losses actually sustained and charged off during the year for which the return is made and which were incurred on account or in connection with the business of manufacture and sale or disposition of munitions or parts thereof, including losses from fire, flood, storm, accident, or other casualties which have not been compensated for by insurance or otherwise. Losses sustained in connection with collateral investments or in connection with any business, the profits from which are not taxable under this Title, can not be deducted from the gross income contemplated by this Title.

Depreciation.

The deduction authorized on this account relates to the loss due to use, wear, and tear of physical property owned and used by the manufacturer but which is not specifically designated or installed

for the purpose of manufacturing munitions or parts thereof,
25 but which without material alteration or change may be used
in connection with other business. The annual deduction
on this account will be a reasonable allowance determined upon the
basis of the cost and probable number of years constituting the life
of the property. If the same buildings and machinery are used for
purposes other than the manufacture of munitions or parts, then
the amount deductible from the gross income for the purpose of this
Title on account of depreciation will be apportioned in accordance
(See Art. 20, Regulations 39.)

Amortization.

The deduction authorized on this account relates to property (buildings and machinery) specially constructed or installed for use in the manufacture of munitions or parts and which, when no longer useful for this purpose, can not, without material alteration or change, if at all, be used for any other purpose. The annual allowance to be deducted on this account will be determined by estimating the probable number of years the property will be used in the manufacture of munitions or parts and by dividing the cost of such property, less estimated salvage, by such probable number of years. The quotient thus obtained will measure the amount to be deducted each year on account of amortization until the cost of property has been extinguished. Neither the depreciation nor the amortization deduction allowable in this return will relate to property

used in its entirety in connection with any other business carried on by the manufacturer. Amortization applies only to those special plants and equipment whose life and value (except salvage) will terminate with the end of the business for which they were erected and equipped. It is to be differentiated from depreciation in that depreciation relates to property whose life and value is not dependent upon or materially affected by its use in the manufacture of munitions or parts thereof. (See Art. 21, Regulations 39.)

Supplementary Statement.

Persons making returns on this Form will, as a part of such return and to aid the Commissioner of Internal Revenue in verifying the figures submitted, furnish the detailed information as hereinafter indicated.

1. Gross Income:

State specifically the method by which the gross income was ascertained. Gross Income—Less manufacturing cost consisting of Labor, Material, Works and General Expense.

2. Raw Materials:

Enumerate principal raw materials used in the manufacture of articles coming within terms of the law. Billets and Bars.

State whether or not and to what extent such raw materials were specially manufactured or produced for use in the manufacture of munitions. For munitions and parts only. And to what extent they were ordinary stock commercial commodities common to the general industrial trade. Special for Munitions. (See General Instructions, "Raw materials.")

27 3. Running Expenses:

Running expenses applied specifically to the manufacture of munitions or parts thereof should be itemized as follows:

(a) Rentals	None
(b) Repairs and maintenance.....	178,679.47
(c) Heat, light and power	223,743.56
(d) Salaries	None
(e) Wages and Miscellaneous.....	3,101,783.05
(f) Other expenditures.....	<div style="display: flex; align-items: center; justify-content: space-between;"> { None None None </div>
Total	\$3,504,206.08

The total here indicated must be the same as that reported under item 5 of the return proper. (See General Instructions, "Running expenses.")

4. Interest Paid:

Interest actually paid on debts or loans, the proceeds of which were used to meet the needs of the business of manufacturing munitions or parts thereof, will, with such debts or loans, be set out below. None. (See General Instructions, "Interest paid.")

5. Taxes Paid:

Taxes paid with respect to the business or property employed in the business. State kind of taxes and amount of each kind.

Proportion of total taxes as per General Instructions. . \$15,710.03
(See General Instructions, "Taxes paid.")

28 6. Losses Sustained:

Losses sustained and charged off in connection with, and growing out of, this particular business and not compensation for by insurance or otherwise.

Kind and amount of loss. None.

7. Depreciation:

Depreciation on physical property not specially erected or installed for this business. (See General Instructions, "Depreciation.")

Regular Depreciation. \$171,274.11

8. Amortization:

Amortization as applied to property specially constructed or installed for use in this business. None. (See General Instructions, "Amortization.")

29

EXHIBIT "B."

Form No. 1089.

To Be Filed in By Internal Revenue Bureau.

Audited By —.

U. S. Internal Revenue.

Munitions Manufacturers' Tax.

The Penalty

For failure to have this return in the hands of the Collector of Internal Revenue on or before March 1 is a fine of \$10,000 or imprisonment not exceeding one year, or both, and an additional assessment of 5 per cent. of the tax.

Return of Annual Net Profits.

(Title III, Act of September 8, 1916, as amended.)

To Be Filled in by Collector.

Collection District —.

Assessment List —, 191—.

Page —.

Line —.

Important.

All information on this form should be read carefully before inserting figures.

30	Return of Net Profits or Income for the Calendar Year Ended December 31, 1916, by Forged Steel Wheel Company, manufacturing steel slabs, Billets, Plates, Bars, shapes and Forged Wheels, and located at Butler, Penna.
1.	Total amount of capital employed in the business or properties and used in the manufacture of munitions or parts thereof \$
2.	Total amount of debts or loans (interest-bearing) contracted to meet the needs of such business \$
3.	Gross amount of income received or accrued from the sale or disposition of munitions or parts thereof manufactured in the United States \$7,758,013.49
4.	Cost of raw materials entering into the manufacture of such articles or parts \$1,208,687.09
5.	Total amount of expenses of operation and maintenance relating to the business or properties 3,504,203.08
6.	Amount of interest paid within the year on debts or loans described in Item 2 None
31	
7.	Taxes of all kinds paid within the year with respect to the business or properties relating to the manufacture of munitions or parts thereof 15,710.03

8. Losses actually sustained and charged of within the year in connection with the business, and not compensated for by insurance or otherwise	None
9. Depreciation on property used in, but not specially constructed or installed, in this business	171,274.11
10. Amount apportioned to the year for amortization of the cost of buildings and machinery specially constructed or installed for use in manufacture of munitions or parts thereof	None
Total deductions, items 4 to 10, inclusive	4,899,877.21
32	
11. Total net profits upon which tax at 12½ per cent. is computed	2,838,136.18
Originally reported Additional Net profits	892,774.71
12. Total amount of tax to be assessed	1,975,361.47

We, J. M. Hansen, President, and T. H. Gillespie, Treasurer, respectively, of Forged Steel Wheel Company, whose return of net profits or income from the manufacture and sale or disposition of munitions or parts thereof is hereinbefore set out, being severally duly sworn, each for himself, depose(s) and say(s) that the facts and figures set out in the foregoing report or in any statement attached hereto, are, to his best knowledge and belief, true and correct in each and every item and particular.

J. M. HANSEN,
President.
T. H. GILLESPIE,
Treasurer.

Subscribed and sworn to before me this — day of —, 191—.
[SEAL.]

General Instructions.

(Same as Exhibit "A.")

The Forged Steel Wheel Company makes the attached amended and supplemental return of its profits alleged to have accrued from

the manufacture and sale of munitions, under protest and at the request of the special agents of the Internal Revenue Department, for the purpose of bringing the facts before the Commissioner of Internal Revenue.

In the original return, dated the thirty-first day of March, 1917, the Forged Steel Wheel Company accounted for all the profits which at that time it considered it had made in the fiscal year, in the manufacture of munitions, and paid the tax thereon. Subsequently, as is hereinafter set forth the Company has been advised and now declares that said return was erroneous and excessive and that the Company was never liable to any munition tax whatever on said profits, nor in fact to any munition tax whatever.

The Forged Steel Wheel Company is engaged in the business of manufacturing steel by the open hearth process and owns its own open hearth furnaces and its own rolling mills. It is not exclusively or primarily engaged in the manufacture of forgings for projectiles, but normally manufactures and sells all kind of rolled steel slabs, billets, shapes, plates and bars. These rolled steel bars constitute a stock or commercial commodity purchasable in the general trade or open market. The Forged Steel Wheel Company manufactures and sells these bars and at times when its production of such bars is insufficient for its needs it purchases such bars in the open market.

34 The manufacture of forgings for projectiles begins with the cutting to proper lengths of the raw steel bars. When such

bars were so cut the Company considered at that time that the bars had lost their identity as a commercial commodity and thenceforth could not, without further treatment, be used by the Company for any other purpose than that for which they were designed, and accordingly under the authority of Article XIII of the regulations of the Treasury Department issued by the Commissioner of Internal Revenue, October 24, 1916 (T. D. 2384), the Company considered that the bars for the first time became a component part of a munition. This belief was subsequently found to be erroneous as the bars had not yet lost their identity as a commercial commodity. During the entire time the Forged Steel Wheel Company has been engaged in the manufacture of forgings for projectiles it has been manufacturing such rolled steel bars. Some of these bars were used in the normal manufacturing business of the Company, some were sold as a stock commodity, others of the bars were diverted to the manufacture of said forgings for projectiles. From time to time the Company purchased in the open market rolled steel bars to be used in the manufacture of forgings for projectiles, when it was unable to manufacture such bars in sufficient quantity for such needs, and at the same time satisfy the demand of its regular customers whose demands were at all times excessive. Under the authority of said Article XIII the Forged Steel Wheel Company treated said rolled steel bars so diverted from its normal business as a stock commodity or commercial commodity, and considered such commodity

35 as a raw material entering into the manufacture of said forgings for projectiles. The market value of said bars, that is, the price at which this Company sells such bars and the price at

which from time to time the Company buys such bars in the open market, is "the cost of raw materials entering into the manufacture" and as such, under paragraph (a) of Section 302 of the Revenue Act of 1916, is allowable as a deduction from gross profits.

The Company in said original return accounted for all the profits made in its operations, beginning at the point where the Company then erroneously considered that the bars lost their identity as a commercial commodity.

In calculating said profits the steel bars purchased from others were charged at actual cost. Where the bars were manufactured in the Company's own plant they were charged at the same price as if bought from others.

In other words, the steel bars used in making forgings for projectiles were treated as raw materials whether they were made by the Company or bought from others and as such raw materials were charged at the prevailing market price for the bars.

The amended return shows an additional profit of \$1,975,361.41 which is a computation arrived at by the special agents of the Internal Revenue Service of the United States Treasury Department which said computation, as a computation, under the rulings of the Internal Revenue Service as explained to us by said special agents, is hereby confirmed by us. This item is composed of two items: one is the sum of \$754,620.88 which is the profit made by this Company on the manufacture of steel bars calculated at their then

36 market value and which were used as raw materials in the manufacture of forgings for projectiles at the Company's own plant. The other item consists of \$1,220,740.59 which was the profit made by this Company on the manufacture of certain rolled steel bars which as a stock or commercial commodity were used in the execution of certain contracts for forgings for projectiles. The said steel bars were furnished by us but the actual forging was done for us by the Standard Steel Car Company, the profit on which forging work has already been returned for taxation purposes by the Standard Steel Car Company.

This Company contends that neither of said items are taxable under the Munitions Manufacturers' Tax Act and respectfully asks for a verbal hearing before the Commissioner and an opportunity to present further evidence.

Furthermore, the Company alleges that it is not and never has been engaged in the manufacture of munitions or any part thereof, and that said original return and all payments made into the Federal Treasury thereon were erroneously made through a wrong interpretation of the Revenue Act of 1916. The Company is advised and so declares that said forgings for projectiles manufactured by it are a stock or commercial commodity and did not lose their identity as such until after they had been sold by the Company and delivered to others. Said forgings have been used and still are used and sold as a stock commodity for the manufacture of automatic automobile jacks, and can be used and are used in the manufacture of pipe couplings, gas containers, and other miscellaneous products. Accordingly, all such forgings made by the Company and sold to others to be used in making projectiles, as they

did not lose their identity as a commercial commodity, were not munitions or component parts of munitions and any profit made in the manufacture of such forgings was not and is not taxable as profits of munition manufacture.

The Company on this point also asks for a verbal hearing before the Commissioner of Internal Revenue and an opportunity to present further evidence.

FORGED STEEL WHEEL COMPANY.

By _____,
President.

38

EXHIBIT "C."

Form 1-17.

Notice and Demand for Tax and Receipt Regular Taxes.

United States Internal Revenue.

	List 23 1917	Sept.	4	7
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Collector's Office	(Year)	(Month)	(Folio)	(Line)
23rd District of Penna.				additional munition tax.
At Pittsburgh, Pa.				(Character of tax or liability)

Date 10/30/17

For period ended 1916

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Taxes, Penalties, etc.

Amount of tax	\$246,920.18
50 per cent penalty,	
100 per cent penalty,	
5 per cent penalty,	
Total	\$

C. G. LEWELLYN,
Collector of Internal Revenue.

Due date 11/29/17.

Received payment,

Collector of Internal Revenue.

Forge Steel Wheel Co.,
Butler, Pa.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped "paid" by the collector it becomes a receipt for taxes.

40

EXHIBIT "D."

Form 1-17.

Notice and Demand for Tax and Receipt Regular Taxes.

United States Internal Revenue.

List 23 1917 Sept. 4 7

Collector's Office (Year) (Month) (Folio) (Line)

23rd District of Penna. additional munition tax.

At Pittsburgh, Pa. (Character of tax or liability)

Date 10/30/17

For period ended 1916

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure 41 to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Due date 11/29/17.

Taxes, Penalties, etc.

Amount of tax	\$246,920.18
50 per cent penalty,	
100 per cent penalty,	
5 per cent penalty,	

Total, \$

C. D. LLEWELLYN.

Collector of Internal Revenue.

Received payment,

C. G. LEWELLYN,

Collector of Internal Revenue.

Nov. 27, 1917.

Forge Steel Wheel Co.,
Butler, Pa.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped "paid" by the collector it becomes a receipt for taxes.

EXHIBIT "E."

Protest.

To the Collector of Internal Revenue of the 23rd District of the State of Pennsylvania:

Forged Steel Wheel Company, a corporation of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Allegheny County, Pennsylvania, has received a notice from you, dated October 30, 1917, advising it that a tax under the Internal Revenue Laws of the United States amounting to \$246,920.18, for the year ending December 31, 1916, has been assessed against it by the Commissioner of Internal Revenue, which tax is payable to you. The notice, among other things, contains a demand for the payment of this tax on or before November 29, 1917, and specifies a penalty of five per cent additional and interest at one per cent. per month for failure to make payment on the last mentioned date. The Forged Steel Wheel Company also understands that if it fails to pay said tax on said date, in addition to imposing the aforesaid penalties, you threaten and intend to seize and sell its property under warrant of distraint and impose other pains and penalties for the non-payment thereof. The Forged Steel Wheel Company understands that this is a tax claimed to be imposed under the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: "An Act

43 to increase the revenue and for other purposes," commonly known as the Munition Manufacturer's Tax Law, and that it is in addition to the Munition Manufacturer's tax for the period ending December 31, 1916, which was heretofore assessed by you and which the Forged Steel Wheel Company has already paid to you.

For the purpose of avoiding the imposition of the above mentioned penalty and interest, as well as the threatened seizure and sale of property under warrant of distraint and other pains and penalties for non-payment thereof, the Forged Steel Wheel Company herewith makes payment of the tax as assessed, to-wit, the sum of \$246,920.18, under protest, on the ground that the requirement of the payment of such tax and the imposition of the said penalty and interest prescribed for failure to make said payment are illegal, for the following reasons, among others:

1. The whole of said tax so assessed as aforesaid is illegal because the Forged Steel Wheel Company was not during the year 1916, or any part thereof, engaged in the manufacture of any of the articles, or any parts of the articles, upon which a tax is imposed under Title III of the Act hereinbefore referred to.

2. The Forged Steel Wheel Company understands that this tax was imposed upon profits made by it during the year 1916 in the manufacture and fabrication of steel, which the Commissioner of Internal Revenue contends are parts of projectiles, whereas in point

of fact the Forged Steel Wheel Company did not manufacture either any complete projectiles or any component parts thereof.

3. Even if the Forged Steel Wheel Company was engaged
44 during the year 1916 in the manufacture of any relatively
complete parts of projectiles, it has already paid all the tax
due the United States thereon.

4. The Forged Steel Wheel Company understands that this present tax assessed by you is based upon the following profits made by this company, to-wit: (a) The profit of approximately \$102,990.35 in the manufacture of steel rounds which were subsequently forged by the company; (b) a profit of \$433,085.32 in the manufacture of steel rounds by the company where the forging was done by other persons, and (c) a contractor's or broker's profit of \$326,699.04 where the steel was neither manufactured nor any forging done by the Forged Steel Wheel Company. Without waiving or limiting any of the preceding reasons for protest against the payment of the whole of this tax, so much thereof as is based upon each of the foregoing items is paid under separate protest as to each item.

5. The Forged Steel Wheel Company maintains that the said additional tax, and each and every part thereof, is invalid, wrongful and excessive, and contrary to its rights under the Constitution and laws of the United States.

The Forged Steel Wheel Company reserves all other and further grounds of objection to the said additional tax, and each and every part thereof, to which it may be entitled, together with the right to assign and all other such grounds of objection thereto, and all rights to return, cancellation and modification thereof in the event that
45 said law or the regulations or decisions of the Department, or any part of said law or said regulations or decisions, shall be declared to be invalid, void or inoperative, or in the event that any ruling or decision heretofore or hereafter made affecting said assessment, demand and payment shall be determined to have been incorrect, or, in the event that said amount assessed, demanded and paid shall be determined to be excessive.

The Forged Steel Wheel Company further avers that the payment herewith made is made under compulsion and duress and without prejudice to its rights. In order to prevent any inference that the Forged Steel Wheel Company waives any question as to the validity of the said tax, or any part thereof, it hereby makes demand for the return of said additional tax herewith paid, and the Collector of Internal Revenue is hereby notified that in the event of his failure to return said amount suit will be entered against him for the recovery of the same.

In witness whereof, the Forged Steel Wheel Company has hereunto set its corporate seal, duly attested, this 27th day of November, 1917.

FORGED STEEL WHEEL COMPANY,
By J. M. HANSEN,
[CORPORATE SEAL.] *President.*

Attest:

WM. BIERMAN,
Secretary.

46

EXHIBIT "F."

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. M. Hansen, of the City of Pittsburgh, Allegheny County, Pennsylvania, being duly sworn according to law, deposes and says, that he is president of the Forged Steel Wheel Company, a Pennsylvania corporation, having its principal office in the City of Pittsburgh; that they were engaged in the business of manufacture of steel, that upon the 30th day of October, A. D. 1917, they were assessed an internal-revenue tax of two hundred forty-six thousand nine hundred twenty and 18/100 dollars (\$246,920.18) which amount they afterwards, on the 27th day of November, A. D. 1917, paid to C. G. Lewellyn, Esq., Collector of Internal Revenue for the 23rd District of Pennsylvania, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz: The said payment was made under protest, the payment being accompanied by a written protest, signed by the Forged Steel Wheel Company, which was then and there handed to the said Collector of Internal Revenue by the agent of said company. A copy of the said protest is attached hereto and sets forth the reasons of said company for making said payment and the reasons why the said company claims that the imposition of said additional tax was invalid and contrary to law. As set forth in said protest, said company at the time of making said payment demanded the return of the 47 amount thus paid, which was refused by the Collector of Internal Revenue and from this ruling or decision of the Collector said company appeals. A copy of the notice dated October 30, 1917, sent by the Collector to the said company and the original receipt of the Collector dated November 27, 1917, for the above mentioned payment are hereto attached.

And Forged Steel Wheel Company now claims that, by reason of the payment of the said sum of two hundred and forty-six thousand nine hundred twenty and 18/100 (\$246,920.18) dollars, they are justly entitled to have the sum of two hundred forty-six thousand nine hundred twenty and 18/100 dollars refunded, and he now ask- and demand- the same.

And this deponent further makes oath that the said claimant is not indebted to the United States in any amount whatever, and

that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.

[CORPORATE SEAL.]

J. M. HANSEN.

Sworn to and subscribed before me this 22nd day of December, A. D. 1917.

[N. P. SEAL.]

G. R. LANDERS,
Notary Public.

My commission expires March 9, 1919.

48 Instructions in Regard to Preparation of Claim.

No. 1. All blank spaces provided in the claim, on page 1, and in the Deputy Collector's Certificate and Collector's Certificates, on pages 2 and 4, must be properly filled. The Collector's Certificate, on page 2, must be signed by the Collector, Acting Collector, or Deputy Collector in charge in all cases. The certificate on page 4 should be signed only in cases where the claim is for amounts paid for stamps.

No. 2. Certificates of purchase of stamps should include all stamps referred to in the claim; also payments of all special taxes upon kinds of business mentioned, liable thereto, and when paid in duplicate.

No. 3. Affidavits must be properly attested by someone having authority therefor. Any person other than an internal-revenue officer administering an oath or affirmation must show by seal or certificate, from the proper authority, that he is qualified to do so. Affidavits may be made before any internal-revenue officer authorized to administer oaths, without fee. An officer in signing a jurat should give the title of his office.

No. 4. In claims arising on account of special-tax stamps it is not sufficient to state that the claimants have done no business for which they would be liable to special tax. Affidavits should be furnished containing specific denial as to each and all of the acts

involving liability to special tax, as found in the statute
49 imposing the tax; for instance, in the case of a retail liquor
dealer That from to
he neither "sold nor offered for sale any foreign or domestic
distilled spirits, wines, or malt liquors in less quantities than five wine
gallons at the same time,".....

No. 5. In cases where two special-tax stamps of the same kind have been issued for the same period and place to the same person or firm, an affidavit as above should be furnished, adding thereto the words, "except in one place (or more, as the case may be) for which he ha- paid the special tax required by law."

No. 6. Where, in case of dissolution of a firm which had paid special tax, the remaining partner or partners have been required

to pay new special tax for the unexpired portion of the time for which tax was paid by the original firm, and claim the refunding of the tax paid, it should be established that from..... to....., the successor carried on the same business as the original firm, and that during such period no person, not a member of the original firm, was taken into partnership.

No. 7. If the period for which the stamp was issued has expired, the affidavit furnished under instructions Nos. 4 and 6 should cover the whole period. If the period has not expired, the affidavit should cover the period from the first day of the first month for which the stamp was issued to the time of making the affidavit.

50 No. 8. A claim for refunding should be made in the name of the party assessed, if living; if he is dead, there should be evidence of his death, and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary, or other similar evidence, should be annexed to the claim to show that the claimant is administrator, etc.

The affidavit may be made by an agent of the party assessed; but, in such a case, there should be evidence of agency, and of the sources of the agent's knowledge concerning the case in question.

When a firm is the claimant, the claim should be in the name of the firm; but a member of the firm should swear to the facts set forth, including that of membership, and should subscribe his individual name. The artificial person, to wit, the firm, can not make oath.

No. 9. When a claim for refunding is made on the ground of a duplicate assessment and payment, the collector will certify to the duplicate assessment and payment on Form 46, giving the full amount both of the assessment and of the payment, and will also give the page, list, and line, in each case.

The collector will, in all cases, insert in his certificate the full amount of the assessment, and not simply the amount claimed.

No. 10. With each claim for the refunding of money paid for tax-paid spirit stamps purchased to replace lost stamps (which claims should be made on Form 46), there should be filed a statement showing the serial numbers of the lost stamps, and the

51 serial numbers of the stamps which replace them, the serial numbers of the packages for which the lost stamps were purchased, and the fact that the new stamps were attached to said packages, and the date of purchase of each lot of stamps. Evidence should also be filed showing in whose possession the lost stamps were at the time of the loss, the manner of loss, and circumstances connected therewith, and the efforts made to recover the stamps. A bond should also be filed with each claim, in double the amount claimed, with two or more sureties approved by the collector, indemnifying the United States against loss in case the missing

stamps should be used. A form of bond for such cases has been prepared, and will be furnished to collectors on application.

Claims for Sums Recovered by Suit.

No. 11. Claims for sums of money recovered by suit for any of the causes, and against any of the officers, enumerated in section 3220, Revised Statutes, should be made upon Form 46. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, date of its commencement, the date of the judgment, court in which it was recovered, and its amount. To this affidavit there should be annexed a duly certified copy of the record and judgment of the court in the case, a certificate of probable cause, and a receipt for all cost, acknowledging payment in full, duly signed by the clerk of the court.

52

Protest.

To the Collector of Internal Revenue of the 23rd District of the State of Pennsylvania:

Forged Steel Wheel Company, a corporation of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Allegheny County, Pennsylvania, has received a notice from you, dated October 30, 1917, advising it that a tax under the Internal Revenue Laws of the United States amounting to \$246,920.18, for the year ending December 31, 1916, has been assessed against it by the Commissioner of Internal Revenue, which tax is payable to you. The notice, among other things, contains a demand for the payment of this tax on or before November 29, 1917, and specifies a penalty of five per cent additional and interest at one per cent. per month for failure to make payment on the last mentioned date. The Forged Steel Wheel Company also understands that if it fails to pay said tax on said date, in addition to imposing the aforesaid penalties, you threaten and intend to seize and sell its property under warrant of distraint and impose other pains and penalties for the non-payment thereof. The Forged Steel Wheel Company understands that this is a tax claimed to be imposed under the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: "An Act to increase the revenue and for other purposes," commonly known

as the Munition Manufacturers' Tax Law, and that it is in
53 addition to the Munition Manufacturers' tax for the period
ending December 31, 1916, which was heretofore assessed by
you and which the Forged Steel Company has already paid to you.

For the purpose of avoiding the imposition of the above mentioned penalty and interest, as well as the threatened seizure and sale of property under warrant of distraint and other pains and penalties for non-payment thereof, the Forged Steel Wheel Company herewith makes payment of the tax as assessed, to-wit, the sum of \$246,920.18, under protest, on the ground that the requirement of

the payment of such tax and the imposition of the said penalty and interest prescribed for failure to make said payment are illegal, for the following reasons, among others:

1. The whole of said tax so assessed as aforesaid is illegal because the Forged Steel Wheel Company was not during the year 1916, or any part thereof, engaged in the manufacture of any of the articles, or any parts of the articles, upon which a tax is imposed under Title III of the Act hereinbefore referred to.
2. The Forged Steel Wheel Company understands that this tax was imposed upon profits made by it during the year 1916 in the manufacture and fabrication of steel, which the Commissioner of Internal Revenue contends are parts of projectiles, whereas in point of fact the Forged Steel Wheel Company did not manufacture either any complete projectiles or any component parts thereof.
3. Even if the Forged Steel Wheel Company was engaged during the year 1916 in the manufacture of any relatively complete parts of projectiles, it has already paid all the tax due the United States thereon.
4. The Forged Steel Wheel Company understands that this present tax assessed by you is based upon the following profits made by this company, to-wit: (a) The profit of approximately \$102,990.35 in the manufacture of steel rounds which were subsequently forged by the company; (b) a profit of \$443,085.32 in the manufacture of steel rounds by the company where the forging was done by other persons, and (c) a contractor's or broker's profit of \$326,699.04 where the steel was neither manufactured nor any forging done by the Forged Steel Wheel Company. Without waiving or limiting any of the preceding reasons for protest against the payment of the whole of this tax, so much thereof as is based upon each of the foregoing items is paid under separate protest as to each item.
5. The Forged Steel Wheel Company maintains that the said additional tax, and each and every part thereof, is invalid, wrongful and excessive, and contrary to its rights under the Constitution and laws of the United States.

The Forged Wheel Company reserves all other and further grounds of objection to the said additional tax, and each and every part thereof, to which it may be entitled, together with the right to assign any and all other such grounds of objection thereto, and all rights to return, cancellation and modification thereof in the event that said law or the regulations or decisions of the Department, or any part of said law or said regulations or decisions, shall be declared to be invalid, void or inoperative, or, in the event that any ruling or decision heretofore or hereafter made affecting said assessment, demand and payment shall be determined to have been incorrect, or, in the event that said amount assessed, demand and paid shall be determined to be excessive.

The Forged Steel Wheel Company further avers that the payment herewith made is made under compulsion and duress and without prejudice to its rights. In order to prevent any inference that the Forged Steel Wheel Company waives any question as to the validity of the said tax, or any part thereof, it hereby makes demand for the return of said additional tax herewith paid, and the Collector of Internal Revenue is hereby notified that in the event of his failure to return said amount suit will be entered against him for the recovery of the same.

In witness whereof, the Forged Steel Wheel Company has hereunto set its corporate seal, duly attested, this 27th day of November, 1917.

FORGED STEEL WHEEL COMPANY,
By J. M. HANSEN,
President.

Attest:

WM. BIERMAN,
Secretary.

[CORPORATE SEAL.]

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Form 1-17.

Notice and Demand for Tax and Receipt Regular Taxes.

United States Internal Revenue.

List 23	1917	Sept.	4	7
Collector's Office	(Year)	(Month)	(Folio)	(Line)
23rd District of Penna.			additional munition tax.	
At Pittsburgh, Pa.			(Character of tax or liability)	

Date 10/30/17

For period ended 1916

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below.

Amount of tax,	\$246,920.18
50 per cent penalty,
100 per cent penalty,

57 Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

5 per cent	penalty.....
Total	

Due date, 11/29/17.

C. G. LEWELLYN,
Collector of Internal Revenue.

Received payment,

Collector of Internal Revenue.

Forge Steel Wheel Co.,

Butler, Pa.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped "paid" by the collector it becomes a receipt for taxes.

58

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At Pittsburgh, Pa.

Date 10/30/17

For period ended 1916

Notice is hereby given that there has been assessed against you the amount set opposite for the liability named which tax is payable to me. Demand is made for the payment of said tax on or before the date given below. Failure to do so will cause a 5 per cent penalty to accrue with interest at 1 per cent per month from due date until paid.

Due date 11/29/17.

Nov. 27, 1917.

Received payment,

C. G. LEWELLYN,
Collector of Internal Revenue.

Forge Steel Wheel Co.,
Butler, Pa.

C. G. LEWELLYN,
Collector of Internal Revenue.

This notice with attached copies must be presented at the time payment is tendered, as when properly stamped "paid" by the collector it becomes a receipt for taxes.

EXHIBIT "G."

Office of President,
Pittsburgh, Pa.,
May 2, 1918.

Treasury Department,
Washington,
April 30, 1918.

Office of
Commissioner of Internal Revenue.

Forged Steel Wheel Company,
Frick Building,
Pittsburgh, Pa.

SIRS:

Your claim for the refunding of \$246,920.18, covering additional munition manufacturers' tax assessed and paid for 1916, has been examined.

This additional tax arose through your failure to report the profit you realized from the manufacture and disposition of forgings used by other corporations in the manufacture of completed shells. The evidence shows that in some cases you manufactured the steel from your own materials and did the forging, whereas in other cases you bought the steel and did the forging. It further appears that in some cases you made the steel from your own materials and had a third party perform the forging work for you, whereas in still other cases you simply secured contracts for manufacturing forgings,
61 purchased the steel from another company, and had a third party perform the forging work.

It is noted your chief contention is that you do not manufacture projectiles or any parts thereof, and that you are, therefore, not subject to the munition manufacturers' tax law.

After careful consideration of all the evidence and the various contentions set forth by you, it is held that the profits arising from all these transactions are taxable, and the action of the revenue agent in reporting you for the above-mentioned additional tax is accordingly approved.

The claim is hereby rejected for the amount thereof.

Respectfully,

DANIEL C. ROPER,
Commissioner.

Affidavit of Defense.

Filed October 4, 1918.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

C. G. Lewellyn, Collector and defendant above named, being duly sworn according to law, deposes and says that he has a just, full and

complete defense to the whole of plaintiff's claim embodied in the statement filed in this case, the nature and character of which is as follows:

First. Defendant admits the averments of fact contained in paragraph numbered 1 in Statement of Claim.

Second. Defendant admits the averments of fact contained in paragraph numbered 2 in Statement of Claim.

Third. Defendant admits the averments of fact contained in paragraph numbered 3 in Statement of Claim, but avers that the plaintiff was also engaged in the manufacture and sale of parts of shells as defined by the Act of Congress approved September 8, 1916.

Fourth. Defendant admits the averments of fact contained in paragraph numbered 4 in Statement of Claim but avers that 63 the alleged steel forgings which were subsequently used by other persons in the manufacture of projectiles and shells were parts of projectiles and shells as defined by the Act of Congress of September 8, 1916.

Fifth. Defendant admits the averments of fact contained in paragraph numbered 5 in the Statement of Claim.

Sixth. Defendant admits the averments of fact contained in paragraph numbered 6 in the Statement of Claim but avers that the forging work on the parts of projectiles and shells were either done by the plaintiff or for the plaintiff.

Seventh. Defendant admits the averments of fact contained in paragraph numbered 7 in the Statement of Claim.

Eighth. Defendant admits the averments of fact contained in paragraph numbered 8 in Statement of Claim.

Ninth. Defendant admits the averments of fact contained in paragraph numbered 9 in the Statement of Claim.

Tenth. Defendant admits the averments of fact contained in paragraph numbered 10 in the Statement of Claim.

Eleventh. Defendant admits the averments of fact contained in paragraph numbered 11 that no part of the said sum of 64 \$246,920.18 has been repaid to the plaintiff, but denies that the whole amount thereof, with interest thereon from the 27th day of November, 1917, remains due and owing from the defendant to the plaintiff.

Twelfth. Defendant admits the averments of fact contained in paragraph numbered 12 in the Statement of Claim.

Thirteenth. Defendant denies the averments of fact contained in paragraph numbered 13 of the Statement of Claim and on the contrary avers that the said tax was levied and assessed under the authority of Section 301 of the Act of Congress approved September

8, 1916, which said section imposes a tax upon every person manufacturing and selling projectiles and shells or any part of projectiles and shells.

Defendant further avers that plaintiff did, during the year 1916, manufacture and sell projectiles and shells and parts of projectiles and shells and that the whole of said tax so levied and imposed by the defendant was legal and in accordance with the Internal Revenue Laws of the United States.

Fourteenth. Defendant admits the averments of fact contained in the first part of paragraph numbered 14 in the Statement of Claim, but denies that said products as described by the plaintiff in said paragraph were other than projectiles and shells and parts of projectiles and shells.

Defendant further avers that all of the steel products and forgings described by the plaintiff in said paragraph were manufactured either by or for the plaintiff.

Defendant denies that plaintiff made an erroneous assumption, that the said products or any portion of said products were parts of munitions under Title III of the Act of September 6, 1916, but, on the contrary, avers that the said gross amount of \$7,738.913.49 was received by the plaintiff from the manufacture and sale of projectiles and shells and parts of projectiles and shells.

Defendant denies that the plaintiff erroneously assumed that a munition tax of 12½ per cent. on the said sum of \$862,774.71, said tax amounting to \$107,841.84 was owing defendant, but, on the contrary, avers that said tax was legally assessed and collected by defendant under the Internal Revenue Laws of the United States.

Defendant denies that the tax of 12½ per cent. on said \$1,975.361.47, said tax amounting to the sum of \$246,920.18, was illegally assessed, but, on the contrary, avers that said tax was lawfully assessed and collected by the defendant in accordance with the Internal Revenue Laws of the United States.

Defendant avers that the said 43,951,174 pounds of steel, which were manufactured by the plaintiff at a profit of \$567,140.67, and which were delivered to the Standard Steel Car Company, were parts of projectiles and shells and defendant further avers that the additional work done on the said parts of projectiles and shells by the Standard Steel Car Company was done for the plaintiff.

Defendant avers that the said 50,190,448 pounds of steel which are alleged to have been purchased by the plaintiff from other companies and delivered to the Standard Steel Car Company at a steel broker's profit of \$653,599.92 were delivered by the plaintiff to the Standard Steel Car Company, and defendant further avers that the manufacture of the said steel into parts of projectiles and shells was done by the Standard Steel Car Company for the plaintiff at a profit to the plaintiff of \$653,599.92.

Defendant denies that the said sum of \$1,220,740.59, made up of the said sums of \$567,140.67 and \$653,599.92, does not represent any profit from forging or any process of munition manufacture, but avers that said sum is a profit accruing to the Forged Steel Wheel

Company on the manufacture and sale by the plaintiff of projectiles and shells and parts of projectiles and shells as defined by the Act of Congress of September 8, 1916.

Defendant denies that the said sum of \$754,620.88 does not represent a profit on the manufacture of munitions or any part of munitions and defendant avers that there is no authority in law permitting the plaintiff to compute the profits from the manufacture and sale of said projectiles and shells and parts of projectiles and shells on the market price of the material used instead of on the actual price paid for the material used.

Fifteenth. Defendant denies the averments of fact contained in paragraph numbered 15 in the Statement of Claim, and, on the contrary, avers that the provisions of the Act of Congress of September 8, 1916, do apply to and levy a munition tax on the profit of manufacturing of the character performed by the plaintiff.

67 Defendant avers that the assessment and collection of the whole of said tax and each and every part thereof were legal and in accordance with the Internal Revenue Laws of the United States.

Defendant avers that the alleged forgings in question were complete parts of projectiles and shells as defined by the Act of September 8, 1916, most of them being fully machined and all of them being drawn and punched and defendant further avers that they were not a stock commodity but were designed, manufactured and sold by the plaintiff for the special purpose of being used as component parts of projectiles and shells.

Defendant avers that the plaintiff's Statement of Claim does not set forth a cause of action and should therefore be dismissed at plaintiff's cost.

Deponent avers that all of the facts herein set forth are true.
C. G. LEWELLYN.

Sworn to and subscribed before me this 3rd day of October, A. D. 1918.

[SEAL.]

G. HORTON,
Dep. Clerk U. S. Dist. Ct.

Service is hereby accepted of a copy of the within Affidavit of Defense.

GORDON & SMITH,
Attorneys for Plaintiff.

Oct. 4, 1918.

68

Trial Memorandum.

Filed January 3, 1919.

Dates of Trial.

Trial opens, Jury sworn, December 20, 1918.
 Case adjourned to January 2, 1919.
 Case resumed January 2, 1919.
 Case resumed January 3, 1919.
 Trial closed January 3, 1919.
 Verdict January 3, 1919.

Names of Jurors.

1. James A. Geer.
2. C. L. Steiner.
3. W. H. Roberts.
4. H. E. Eaby.
5. Wesley Heslop.
6. Van Johnson.
7. Richard J. Plunkett.
8. Wallace M. Mustard.
9. Leo Reed.
10. Henry E. Cook.
11. James G. Templeton.
12. Thomas E. Armstrong.

January 2, 1919—Juror No. 4 being absent, the trial proceeds with Jury of 11 men by agreement.

Plaintiff Witnesses.

Nevin Connell.
 Wm. G. Helser.
 Wm. Bierman.
 C. G. Beacon.
 D. H. Ramsbaugh.
 W. D. Uptergaaff.

69

Clerk's Memorandum.

Before Judge Thomson.
 Appears for Plaintiff, Geo. B. Gordon.
 Appears for Defendant, B. B. McGinnis.
 Jury called and sworn, December 20, 1918.
 Trial begun January 2, 1919.
 Opens for Plaintiff, Gordon.
 Witnesses called, worn, etc., on part of Plaintiff.
 (See names within.)
 Plaintiff's close- 10:25 A. M. January 3, 1919.

Opens for Defendants, 10:30 A. M., January 3, 1919.
 Witnesses called, sworn, etc., for Defendant.
 (See names within). No testimony.
 Defendants close-, January 3, 1919.
 Case closed January 3, 1919.
 No. 216 November Term, 1918.

Jury.

1. James A. Geer.
2. C. L. Steiner.
3. W. H. Roberts.
4. H. E. Eaby.
5. Wesley Heslop.
6. Van Johnson.
7. Richard J. Plunkett.
8. Wallace M. Mustard.
9. Leo Reed.
10. Henry E. Cook.
11. James G. Templeton.
12. Thomas E. Armstrong.

70 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1918.

No. 2016.

FORGED STEEL WHEEL COMPANY

vs.

C. G. LEWELLYN, Collector of the United States Internal Revenue for the 23rd District of the State of Pennsylvania.

Case came on for trial on Thursday, January 2, 1919, at ten o'clock A. M., before Honorable W. H. S. Thomson, J., and a Jury, at Pittsburgh, Pennsylvania.

Appearances:

George B. Gordon, Esq., A. H. Wintersteen, Esq., for the Plaintiff.
 B. B. McGinnis, Esq., Ass't United States Attorney, for the Defendant.

Jury sworn.

Mr. Gordon opened plaintiff's case.

By Mr. Gordon: I offer in evidence the first paragraph of Plaintiff's Statement of Claim, reading as follows:

"Forged Steel Wheel Company, the plaintiff in this case, is a corporation duly organized and existing under the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Allegheny County, Pennsylvania, and is a citizen and resident of the State of Pennsylvania and of the Western District thereof."

I offer in evidence the second paragraph of Plaintiff's Statement of Claim, reading as follows:

"C. G. Lewellyn, defendant in this case, is a citizen of the State of Pennsylvania and a resident of the City of Uniontown in the Western District of said State of Pennsylvania, and at all times herein-after mentioned was and is now the Collector of the United States Internal Revenue for the 23rd District of the State of Pennsylvania.

Said Internal Revenue District comprises within its boundaries the places where the plaintiff's principal office and the manufactory hereinafter mentioned are located."

I offer in evidence the third paragraph of Plaintiff's Statement of Claim, reading as follows:

"At all times during the year 1916 the plaintiff was and
72 is now engaged in the manufacture and sale of steel forgings.

Plaintiff's said manufactory is located at the City of Butler,
in the State of Pennsylvania and the Western District thereof."

Mr. McGinnis: We object to offering it in its entirety. We admit part of it, but deny part of it.

By the Court: I think the averment is properly made.

By Mr. Gordon: I offer in evidence the fourth paragraph of Plaintiff's Statement of Claim, and in connection with it I offer Exhibit "A" attached to the Statement of Claim, the fourth paragraph being as follows:

"In the year 1917, to wit, on or about the 31st day of March, the plaintiff, at the instance of the defendant, made a return of profits earned by it in the year 1916 in the manufacture of steel forgings, which were subsequently used by other persons in the manufacture of projectiles. A true and correct copy of said return is attached hereto and marked Exhibit 'A'."

By Mr. McGinnis: Defendant admits part of the fourth paragraph, but objects to the statement that the return was made on forgings,
73 and as stated in the affidavit of defense, were parts of projectiles and shells, instead of forgings.

By the Court: The averment of the fourth paragraph is that the plaintiff made return of the profits earned by it in the year 1918 in the manufacture of steel forgings, which were subsequently used by other persons in the manufacture of projectiles. The Affidavit of Defense admits the averments of fact contained in said paragraph, but avers that the alleged steel forgings which were subsequently used by other persons in the manufacture of projectiles and shells, were parts of projectiles and shells of the kind covered by

the Act of Congress. I regard this not as a denial of the averments of fact, but a conclusion in connection with defendant's averment, and I think the plaintiff is entitled to have the offer admitted as made. The objection is therefore overruled and an exception granted to the defendant.

By Mr. Gordon: I offer in evidence the fifth paragraph of Plaintiff's Statement of Claim, reading as follows:

"Subsequently, to wit, on or about the 30th day of October, 1917, the defendant levied and imposed upon the plaintiff a tax upon its 1916 profits referred to and as shown in the return mentioned in the preceding paragraph, under the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: 'An Act to increase the revenue and for other purposes,' commonly known as the Munition Manufacturers' Tax Law, amounting to \$107,846.84, which was thereafter, to-wit, on or about the 27th day of November, 1917, paid by the Forged Steel Wheel Company."

74 I offer in evidence the sixth paragraph of plaintiff's Statement of Claim, reading as follows:

"Subsequently, the accounts of the plaintiff company were audited by Examiners of the Internal Revenue Department. Said Examiners suggested that the return which had been made by the plaintiff of its profits for the year 1916 was improper in that it did not include profits which had been made by the plaintiff in the manufacture of steel before the forging process began and that it also failed to include profits made in the manufacture of steel furnished to subcontractors, who did the forging work on some of these products, and in that plaintiff did not include profits made by it on forgings which had been purchased from others, where none of the work thereon had been done or performed by the plaintiff."

By Mr. McGinnis: We object to the offer of the sixth paragraph, for the reason that the Affidavit of Defense avers that the forging work done on the parts of projectiles and shells were either done by the plaintiff or for the plaintiff.

By Mr. Gordon: I will omit the last line, and offer the sixth paragraph except the last line, "where none of the work thereon had been done or performed by the plaintiff."

By the Court: With that amendment, the offer is admitted.

75 By Mr. Gordon: I offer in evidence the seventh paragraph of Plaintiff's Statement of Claim, and in that connection I offer Exhibit "A" attached to the Statement of Claim, the seventh paragraph reading as follows:

"The plaintiff thereafter, at the request of said Examiners, made, under protest, a supplemental return setting forth the facts mentioned in the preceding paragraph with reference to said matter. A true and correct copy of said supplemental return is attached hereto and marked Exhibit 'B.' "

I offer in evidence the eighth paragraph of Plaintiff's Statement of Claim, and in that connection offer Exhibits "A" and "E," which are attached to Plaintiff's Statement of Claim, the eighth paragraph reading as follows:

"Subsequently, to wit, on or about the 30th day of October, 1917, the defendant, as Collector of the United States Internal Revenue for the 23rd District of Pennsylvania, claiming to act in pursuance of the provisions of Title III of the Act of Congress approved September 8, 1916, entitled: 'An Act to increase the revenue and for other purposes,' commonly known as the Munition Manufacturers' Tax Law, assessed upon and demanded of the plaintiff the sum of \$246,920.18, which the defendant claimed to be due and payable by the plaintiff as the munition manufacturers' tax on the profits made by the plaintiff in the year 1916 in addition to the sum of \$107,846.84, which had already been paid by the plaintiff. A true

and correct copy of said assessment is attached hereto and
76 marked Exhibit 'C.' The defendant threatened to enforce
the payment of said tax, together with the penalties and
interest as provided in the Act, by distress and sale of the plaintiff's
property, and thereupon the plaintiff, solely to avoid the imposition
of the penalties and interest and the threatened distress and sale,
and under compulsion, duress, coercion and protest, paid to the
defendant, as such collector, on or about the 27th day of November,
1917, the amount of said assessment, to wit, the sum of \$246,920.18
(a true and correct copy of defendant's receipt therefor is hereto
attached and marked Exhibit 'D'), and at the same time protested
in writing that no tax was due from the plaintiff and that the defendant
was without authority to exact and collect the same and stated
that plaintiff paid the same under duress and compulsion and that
suit would be brought to recover the same. A true and correct copy
of said written protest is hereto attached and marked Exhibit 'E.'"

I offer in evidence paragraph nine of Plaintiff's Statement of Claim, and in that connection Exhibit "F," referred to therein, the ninth paragraph reading as follows:

"Subsequently, to wit, on or about the 22nd day of December, 1917, the plaintiff duly took an appeal from the action of the said Collector to the Commissioner of Internal Revenue and demanded re-payment of said tax in accordance with the law and the regulations and rules of the Treasury Department. Said appeal was duly
77 perfected and filed with the Commissioner of Internal Revenue on or about the said 22nd day of December, 1917. A true and correct copy of said appeal is hereto attached and marked Exhibit 'F.'"

I offer in evidence the tenth paragraph of Plaintiff's Statement of Claim, and in that connection Exhibit "G" referred to therein, the tenth paragraph reading as follows:

"Subsequently, to wit, on or about the 30th day of April, 1918, the Commissioner of Internal Revenue disposed of said appeal finally and rejected and dismissed the same. A true and correct copy of the Commissioner's order disposing of the same is hereto attached and marked Exhibit 'G.'"

I offer in evidence the first part of the eleventh paragraph of Plaintiff's Statement of Claim, that is to say, "No part of said sum of \$246,920.18 has been repaid to the plaintiff."

I offer in evidence the twelfth paragraph of Plaintiff's Statement of Claim, reading as follows:

"This is a suit of a civil nature at common law, and the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and this suit and the cause of action therein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for Internal Revenue."

I offer in evidence all of paragraph fourteen of Plaintiff's Statement of Claim except the words, "which was the raw material used by them in said manufacture," and the words in line 12, "for manufacture into part of a projectile," the said paragraph as amended reading as follows:

"Forged Steel Car Wheel Company is a subsidiary corporation of the Standard Steel Car Company. The Standard Steel Car Company is engaged in the business of manufacturing steel railroad cars and the primary business of the Forged Steel Wheel Company was and is to furnish steel wheels and other steel forgings and rolled steel materials to the Standard Steel Car Company. It also supplies these same commercial commodities to others. Its business begins with the manufacture of steel by the open hearth process from raw materials, consisting mainly of pig iron and scrap. The steel when in a molten state is cast into ingots. The ingots are then re-heated and are rolled into either billets or slabs. The billets are made of different sizes and weights to suit the size desired for the final rolled product and the capacity of the mill in which they are to be rolled and are re-heated before final rolling. The company has two finishing mills, one a 12-inch mill and one an 18-inch mill, both of them capable of rolling rounds, flats and commercial shapes. During the year 1916 various persons or corporations who were engaged in the manufacture of projectiles in the United States contracted with the plaintiff to purchase from it certain steel, which was the raw material used by them in said manufacture, * * * and the plaintiff contracted to supply the same in the shape of steel forgings, which were adapted as to shape, weight and character of steel to the 79 purchasers' requirements. The materials so furnished by the plaintiff consisted of steel rounds from 4 1/2 to 6 1/2 inches in diameter and 14 inches long, which had been put through two forging and pressing operations to bring them to a shape in which they could be conveniently used. * * * The plaintiff secured

contracts for more materials than it could furnish and the forgings that were eventually furnished by it to said projectile manufacturers were to some extent manufactured from steel rounds which plaintiff had itself made and to some extent from steel which it had purchased from other steel manufacturers, and the forging was to some extent done by the plaintiff and to some extent by other persons for it. That is to say, in some cases plaintiff made the steel, rolled it into rounds, and did the forging; in other cases plaintiff made the steel rounds and a third party did the forging; and in other cases plaintiff did no manufacturing at all, that is, plaintiff purchased the steel rounds and a third party did the forging, so that the entire manufacturing process was done by others, and neither the complete forgings nor any of the materials out of which they were made have been in plaintiff's possession."

By Mr. McGinnis: Do I understand that the paragraph as amended is to be admitted, down to "plaintiff's possession?"

By Mr. Gordon: Yes. We will leave out the words "did no 80 manufacturing at all," and insert the words "actual possession."

By the Court: As so modified, the offer is admitted.

By Mr. Gordon: I offer all the rest of the fourteenth paragraph in evidence, except the words "erroneous assessment" in the second and third lines from the bottom of page 6; the word "erroneously" in the eighth division of paragraph fourteen on page 7; the word "illegal" in the thirteenth line from the bottom of the page, and the words "a steel broker's."

By Mr. McGinnis: As I understand it, if you eliminate the words "erroneous assessment," it does not make connected reading.

By Mr. Gordon: We will eliminate the word "erroneous." It occurs again on the next page, "erroneously returned," and "illegally assessed." Strike out the word "illegally," and at the bottom of page 7 the words "a steel broker's profit;" it should read "at a profit."

On page 8 I do not offer the second paragraph. It begins "the said sum of" and ends with the words "Standard Steel Car Company." We will strike that out. Then I do not offer the words in the next paragraph, the first part of the second sentence, "This does not in any manner represent a profit on the manufacture of munitions or any part of munitions." Also strike out the word "erroneously" at the top of page 8.

81 *Testimony of Nevin McConnell.*

NEVIN McCONNELL, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gordon.

Q. Where do you live?

A. In Butler, Pa.

Q. What is your business?

A. I am superintendent of the Forged Steel Wheel Company's plant at Butler.

Q. How long have you been there?

A. A little over nine years.

Q. Were you superintendent there in the year 1916?

A. I was.

Q. I wish you would tell the jury now in a brief way, what that plant is there, what you have there.

A. The Forged Steel Wheel Company's plant consists of an open-hearth plant of ten 65-ton furnaces, that is, they make 65 tons per twelve hours. They are contained in a building about 240 feet wide by a thousand feet long. Slabbing and blooming mill that rolls the ingots into semi-finished products, in a building about 16 by 900 feet. We have a forged wheel department for forging freight, passenger locomotive wheels. It consists of four 10,000 ton presses in a building 160 by 1100 feet. We have two mills known as merchant mills, a 12 and an 18-inch, that roll bars, rounds, squares, angles, tees, etc., as used in the regular trade. That constitutes the 82 principal part of the Forged Steel Wheel Company's plant, with the addition of machine shops, carpenter shops and such auxiliaries as go with the plant.

Q. Where do you begin now in the manufacture of steel?

A. We usually begin at the open-hearth department.

Q. Do you make pig iron?

A. No. We purchase pig iron and scrap necessary to make the steel.

Q. Your raw material when you start your business, is the pig and the scrap?

A. Yes, sir.

Q. Now, that is first converted into steel?

A. Yes.

Q. In these open-hearth furnaces?

A. Yes.

Q. Then what shape is that left in—what do you do when you run it out of the steel furnace?

A. The pig iron and scrap is charged into the furnace and moulded, until it has reached a certain consistency, that meets the specification or requirement of the particular kind of steel. Then it is taken out into a large ladle and poured into ingot moulds, from the bottom of the ladle. Those ingots are allowed to cool to a certain degree, and then the mould is stripped from the ingot and the ingot charged into the heating furnace in the blooming mill. From there they are heated and rolled into blooms or billets, or slabs, for making wheels.

Q. Right there. Does your process sometimes end there, 83 and do you sell them in that shape, in billets and slabs?

A. We do. We sell billets and blooms, and slabs, and oftentimes plate, from the same mill.

Q. Now, then, when you go on further with your process, what do you do next?

A. The slabs are taken to the wheel pressing department and there heated and forged into wheels. Then they are transferred from the forging department to the finishing department for turning, boring and inspection, etc. The blooms are taken to the two merchant mills and rolled into various products, such as rounds, squares, angles, Z bar, or whatever the order may call for. The blooms and billets for shipment are inspected at the blooming mill, and shipped just as produced.

Q. How about bars and plates, and things of that kind?

A. They are rolled and sheared according to the order.

Q. And your rounds?

A. The rounds the same way.

Q. If I understand it, the same rolls are adapted for rolling into different shapes and forms?

A. We change the rolls to suit the form, for each specific order.

Q. But you use the same mill?

A. The same mill and the same system; the same everything.

Q. Do you make any other kinds of forgings, except the forgings for car wheels?

A. Yes, we make projectile forgings, or rough forgings as we term them.

84 Q. Do you make anything else?

A. No other finished products.

Q. Do you recollect the forgings that you made for projectiles in the year 1916?

A. Yes, sir.

Q. I wish you would state to the Court, what the process was, what you did, in making those forgings, in what shape you left them?

A. The process of making forgings consists of taking the round bars according to the size of the finished forging. They make about three, four, five or six—

Q. How did you make those round bars, to begin with?

A. The bars are first nicked—

Q. How did you make a bar? Take a 6-inch bar, for example.

A. They are made from a bloom as I have described before, in one of those mills, rolled into a round bar and cut to a length which is a multiple of the bars required. Then they are inspected and tested by the Government or the company receiving them, tested both chemically and physically. Afterward they are piled in the yard ready for use for the next process or the next department.

Q. I show you photograph, Exhibit "H," and ask you what that is?

A. This is a pile of steel rounds, after being inspected, ready for going into the nicking department. Those are six and nine-sixteenths rounds, evidently, all about eleven feet long.

Q. About 6.9 in diameter and about 11 feet long?

A. Yes.

Q. What does Exhibit "I" show?

85 A. This exhibit shows a pile of blooms, piled in the yard of the finishing mill, ready for rolling into round bars.

Q. That is, that is the stage in which the steel was before it was rolled round?

A. Yes, sir.

Q. When you wanted to go on with—This process up to the end of the rolling of the bars round, was conducted in your rolling mill department?

A. Yes.

Q. Then what did you do next, when you wanted to make forgings out of these bars?

A. The next step was to cut it into lengths at the nicking department.

Q. What do you mean by that?

A. The bar is put into a machine and cut into a given length in other words, it is nicked in about half an inch deep.

Q. That is, you cut a nick around it about half an inch deep with a lathe?

A. Yes. The lathes are multiple and cuts all multiple bars at one time. Then the bar is taken out of the lathe, taken to a large hammer and broken at the nick.

Q. By a blow of the hammer it is broken into pieces?

A. Yes.

Q. I show you Exhibit "J," and ask you what that shows.

A. This shows the team hammer in the nicking department in the act of breaking the bar, making it ready for inspection. It shows the broken pieces.

86 Q. It shows the broken pieces as they come from the hammer?

A. Yes.

Q. What was the next thing you did with them? I call your attention to this piece of steel here on the floor, and I wish you would tell us what that is?

A. That is one of the blocks of steel after being broken at the hammer.

Q. It is a piece of the round that you referred to?

A. A piece of rounds, such as I referred to.

Q. A little over six inches in diameter?

A. Yes, sir.

Q. When you took that to the forging department, what did you do?

A. Before going to the forging department, those blocks are examined by the inspectors and either accepted or rejected. Then they are taken to the forge department and heated in the furnace to a suitable temperature. Then they are put into a press of about 400 ton capacity, and pierced with a piercing tool, and then withdrawn from the press and put through an elongating press, in what we call a draw press. The forging is put through three, four or five draw rings to elongate it to the length required.

Q. What is this larger piece here?

A. That is what we call a six-inch forging.

Q. Is it made from the solid round that is shown here?

A. Yes, sir.

Q. What did you do with these after you made them?
A. We shipped them.

Q. That was the end of your process?
A. The end of our process.

Q. You didn't do anything toward making a shell or part
of a shell or projectile, further than this piece, that is, you didn't
carry the process any further than this piece?

A. No, sir, that is as far as we went.

Q. There is one here that is sawed in two. Is that the same
rough forging?

A. I believe it is, yes, sir.

By Mr. Gordon: We just had this sawed in two, so the shape of
the whole thing could be seen.

Q. This large piece is the shape in which you sold it?
A. Yes, sir.

Q. Do you know what those weigh?

A. They weigh about 170 pounds. I might say they vary ac-
cording to the type. We made them from 145 up to 175.

Q. That was regulated by the amount of steel that there was in
the block, I suppose?

A. Yes, sir, and the bore and length.

Q. And this piece is the result of two forging operations, as I
understand. You take the steel block and it is put through two
presses?

A. It is first pierced, and then drawn.

Q. What does that photograph, Exhibit "K", show?

A. This shows a number of blocks of steel with finished forging,
the same as we have on the floor. A number of other blocks put
into the furnace.

Q. I meant the one in the foreground, 1, 2, 3, and 4 in
ink. What is No. 1?

A. No. 1 is a block of steel such as we have on the floor.
Q. No. 2?

A. No. 2 is a forging as it comes from the press, the first oper-
ation. No. 3 is a forging as it comes from the finishing press or
raw press, and No. 4 is the same forging turned over on its side,
judge.

Q. Turned over so you can look into it?

A. Yes, sir.

Q. When you spoke of the piercing operation, did you mean to
bore a hole all the way through and make it a tube?

A. No. It is pierced to within a certain distance of the bottom.

Q. As shown on this one that is split here, so that the bottom end
ways remains closed?

A. Yes, sir.

Cross-examination.

By Mr. McGinnis:

Q. Did you make these forgings here from a contract, were you filling a contract?

A. Yes, sir, we filled an order. I don't know whether it was a contract or not. I assume it was.

Q. You have stated this steel required a specification, that is, you made your material first in slabs according to specifications?

A. Yes, sir.

Q. Do you know what the specifications were for this material here?

A. Yes, sir.

89 Q. Will you state?

A. Do you mean the chemical contents?

Q. Yes.

A. The chemical contents for British Government steel had a carbon content of .55 or under; no bottom limit; manganese 70; phosphorus and sulphur below .04, and a minimum of 15 in silicon.

Q. Who furnished those specifications?

A. The British Government, or whoever furnished the contract.

Q. You had an agreement with the British Government to manufacture these forgings, I assume?

A. Yes, sir.

Q. Did you know what the specifications were or what these forgings were for?

A. Yes, sir.

Q. At the time you made the contract?

A. Not at the time we made the contract. At the time I made the material.

By Mr. Gordon:

Q. You didn't make the contract?

A. No.

By Mr. McGinnis:

Q. But you knew that when you started out to make these forgings they were for filling this contract according to specifications?

A. Yes, sir.

Q. Were the steel bars as made up from those specifications, the ordinary material used in trade for bars?

A. Practically so. We sold it for other purposes.

90 Q. Can you state what other purposes, any of these bars were ever used for, having these same identical specifications, except for forgings for shells?

A. Yes, we used them for angles, for locomotive work, channels, rounds for special bolt steel, for automobile crank shafts, and many other purposes of that kind.

Q. You stated that they were tested chemically and physically. Who did that?

A. Our laboratory did the chemical testing, and also the inspectors made a check analysis.

Q. Who were the inspectors?

A. Depending on whom the contract was with. If it was the British, it was the British inspectors; if French, the French inspectors; if United States, inspectors for the United States government.

Q. In other words, they had to meet chemically and physically the specifications?

A. Yes, sir.

Q. And were examined by inspectors either from the Government or from the manufacturer to whom you sold them?

A. Yes, sir.

Q. But no matter for whom you made these forgings, whether for the British Government, or whom, the Government had inspectors in your plant watching the processes?

A. Yes, sir.

Q. All the while?

A. Yes, sir.

Q. You stated the round bars were made up from blooms, and these blooms, I assume, were made according to specifications?

91 A. Yes, sir.

Q. Then the bars were nicked?

A. Yes, sir.

Q. And then they were broken with a hammer?

A. Yes, sir.

Q. Then sent to another department?

A. Yes, sir.

Q. And put through heating in a furnace?

A. Yes, sir.

Q. Then taken out and put in a press?

A. Yes, sir.

Q. And pierced?

A. Yes, sir.

Q. Then the forging was taken and run through rings?

A. Yes, sir.

Q. Do you know how many rings?

A. As a rule, three.

Q. Three different rings?

A. Yes.

By Mr. Gordon: That is, a ring press, a press with rings in it?

A. A press with rings in it, yes.

By Mr. McGinnis:

Q. Can you state how many tons of steel the specification of which was identical with the specification for these forgings, were turned out by your plant in the year 1916?

A. Yes, sir.

Q. About how much?

A. About 18,000 tons.
92 Q. At the same manganese, same carbon, all the way through?
A. Well, the same enough to pass it.
Q. I didn't understand you.
A. The heats were not identical, but they were of a character that passed the steel.

By Mr. Gordon:

Q. Within the same limits, you mean?
A. Yes.

By Mr. McGinnis:

Q. Did you make any other steel in your plant that conformed identically in chemical analysis, for other purposes than this steel here?
A. Yes, sir.
Q. About 18,000 tons?
A. 18,000 tons of this in the year 1916.
Q. That is, aside from what you used in the manufacture of forgings?
A. No; that was the forgings themselves.
Q. That was the forgings themselves?
A. Yes; 18,000 tons was the shipped forgings.
Q. I am asking how much steel you made of that same chemical analysis for other purposes than these forgings?

A. I couldn't give you any definite figure, but it was quite a large amount, much larger than the amount made in forgings.
Q. You can't give us any figures?
A. No. I should say possibly it would be sixty or seventy thousand tons.
93 Q. Do you mean that those six or seven thousand tons were in this form or in this form? (Indicating.)
A. I said sixty or seventy thousand. Neither of those forms.
Q. In neither of these forms?
A. Neither of these forms.

Redirect examination.

By Mr. Gordon:

Q. Car steel, how does that compare with this as to chemical constituents?
A. It depends on what part of the car it is for.
Q. Do you make steel for car wheels the same as this?
A. For car wheels the carbon content is a little higher, with the other chemistry the same. For steel axles for cars, it is almost identical.
Q. Is it within the same limits?

A. Within the same limits. For the body of the ear, such as the plate and the angles, it is softer.

Q. You have been asked about the Government *inspector* by the Government inspectors. Is that peculiar to the sale of these forgings that were to be used in government work, or do you have inspectors for ordinary sales for railroads, for instance?

A. We have inspectors for all classes of material, practically. I should say eighty or eight-five per cent of all the manufacture is inspected in the same manner.

Q. That is, it is customary with all the large buyers, to have inspectors to see that the process is continued all the way through, so as to bring about the results which the contract called for?

94 A. Yes. The Pennsylvania Railroad, the New York Central, the Erie, and all the large railroads have a staff of inspectors, who come to our works and inspect the material all the way through.

Q. Just the same as the British Government did?

A. Just the same.

Q. You spoke about British and French and United States inspectors in 1916. What sort of shell steel was it?

A. In 1916 it was all for the British Government.

Q. You mean by that it was all shipped to the British Government, or shipped to other people?

A. Shipped to other people; only a small part to the British Government.

Q. In the United States?

A. Yes.

Q. Whom do you reollect as having shipped to.

A. Spang & Company of Butler, Baldwin Locomotive Works of Philadelphia, and Griscom-Russell Company at Massillon, Ohio.

Q. And they bought this steel in this shape from you, but it had to be according to the specifications, to pass the British specifications, although you were selling it to local manufacturers in this country?

A. Yes, sir.

By the Court: You mean these forgings?

By Mr. Gordon: These forgings.

95 Recross-examination.

By Mr. McGinnis:

Q. You stated the chemical analyses were the same, within the same limits, that is, the product in these bars were the same as the product in other lines. What do you mean by the "same limit?"

A. The limit of carbon might be 50 to 60; anything in between those two points would be inside the limit.

Q. Then when you say you made other steel for other purposes, you don't mean to say that they were identically that analysis, but the same percentages of the component parts, but within certain limits?

A. They were inside the same limits as the steel made for this.

By Mr. Gordon:

Q. Therefore, it was identical?
A. Identical.

By Mr. McGinnis: That is just what I want to bring out.

By Mr. Gordon: That is, there are no two pieces of steel identical. What he means is that there were limits, and they were within the same limits.

A. For instance, in the manufacture of steel, it often suited us in making a heat and passing it for the British Government, to apply it to another contract, for the sake of convenience, to get out an order. We did that quite frequently.

96 By Mr. Gordon:

Q. You sometimes used part of the heat for one order, and another part of the heat for another order?

A. Yes.

By Mr. McGinnis:

Q. That is, in manufacturing a bar?
A. Yes, sir.

Recess.

Afternoon Session.

Testimony of William Grant Hoelsel.

WILLIAM GRANT HOELSEL, a witness called on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Where do you live?

A. Butler, Pa.

Q. What is your business?

A. I am assistant to the manager of the Standard Steel Car Company.

Q. Did the Standard Steel Car Company manufacture any projectiles?

A. They have, yes, sir.

Q. Do you understand the making of projectiles?

A. I do.

97 Q. Do you understand the process that the steel goes through in the manufacture of projectiles?

A. I do, yes.

Q. In the manufacture of projectiles by your company, in what shape did you purchase the steel?

A. In the rough forgings shaped such as indicated by the exhibit on the floor.

Q. That is, by this largest rough steel forging?

A. Yes, sir.

Q. I wish you would go ahead and tell the jury in your own way what was necessary to be done with that piece of steel before it became a projectile or part of a projectile.

A. The rough forging, or forging as it was generally termed in our plant, was received in the shape in which you see it, and in the first operation the shell was chucked on its outside surface.

Q. What do you mean by "chucked"?

A. It was gripped by a series of jaws in the machine on the outside surface, and the open end cut off to what we would term a rough length.

Q. That is, the upper open end?

A. The upper open end of the the forging was cut off. In other words, the excess steel was removed; not all of it, but the greater portion of the excess material. From that we put it on the mandrel. By that I mean a stem which fitted into the open hole of the forging, turned it up with the closed end on top, and centered it in a machine that revolved not only the forging but had a revolving drill and gave us a center that was concentric, we will say, with the pierced hole in the forging.

Q. The other end?

A. The closed end.

98 Q. That was the lathe operation?

A. That was a special machine operation, what we call a special centering machine, a vertical centering machine.

Q. That was the second machining operation?

A. Yes, sir. The third machining operation took the rough forging in a rough turning machine. It was again chucked, with an expanding mandrel on the inside of the open end and centered with a tail stick center on the closed end in the hole we had drilled, and a cut taken off the outside, leaving from one-fourth to five-sixteenths of an inch finish on the outside of the shell. That was what was known as the first rough turning operation. After that the shell was taken to the boring machine, where it was chucked on the turned outside surface, and the exterior of the shell bored. That was done in three operations. The first, the boring operation, what we termed the barrel rougher, a tool which took the straight part of the bore. Then following that a profile rougher, which went down to the bottom of the hole on the inside and took out a considerable portion of the excess stock, clear to the bottom. The third operation was known as the finishing tool, which finished not only the straight part of the shell but the tapered portion and the bottom of the hole as well. That to all intents and purposes, finished the inside of the forging. From that point we re-centered, came back on the machine similar to the first centering machine I described, and re-centered to the true finished bore, cut off the old center from the shell and put an entirely new center in.

Q. On the bottom?

99 A. On the bottom. The centering is all done on the closed end of the shell. After that process was completed, we took it to what was known as the second rough turn, came back to the finished bore with the mandrel, to the second center which we had put on the closed end, and took another cut from the exterior of the forging, still leaving about three-thirty-seconds of an inch finish for later operations, but getting the bore and the outside of the forging as nearly concentric as it was possible to get it. I describe that particularly because in the manufacture of a finished product it is necessary that the walls be very, very uniform, the tolerance being a matter of a very few thousandths.

Q. A few thousandths of an inch?

A. Yes, sir. Roughly speaking, I think it was about fifteen thousandths, the total.

Q. When you got through, it would have to be within the limit of fifteen thousandths of an inch?

A. Yes, sir. After the second rough turning operation, the forging in that state, the rough cylinder was submitted to the Government inspectors, who made the final inspection at that point of the interior finish of the bore, and if acceptable at that point it was then taken to what we call our nosing furnace.

Q. Those pieces of steel that we might call a cannon shape, and are bright on the inside, is that the stage which you have last spoken of?

A. I think not, no.

Q. What stage is this?

A. That is after the rough turning operation and the bore operation.

Q. This piece is after the first rough turning operation?

A. Yes, sir.

100 Q. Then these other operations you have spoken of here, are finishing, boring and centering?

A. And another cut on the outside.

Q. Are taken afterwards?

A. Yes. The last condition I described, the forging would be in approximately the shape as you see it there, but different by reason of the fact that the inside bore would be finished, the bottom cut off and a smaller diameter on the outside.

Q. Where you said it went to the nosing furnace?

A. Yes.

Q. What is that, and what was done then?

A. The shell was heated for a distance of approximately six inches back from the open end.

Q. That is, the piece was shaped like this?

A. Yes. It was heated to a temperature not exceeding about 1900 degrees Fahrenheit, a rather particular operation, because the interior of the shell having been finished, you must maintain a certain contour on the inside of the shell, and both the heating for the nosing and the nosing process itself are particular by reason of the fact that you must maintain that particular radius on the inside. After it is heated properly it is placed in a press, in a die. The

bottom of the shell is held, gripped, so that it cannot turn and get out of place, and a die having the shape of the forging on the floor, comes down over the open end of the shell and brings it to approximately the shape you see it there. That is known as the nosing operation.

Q. That is a forging operation?

A. A forging operation in which the nose is formed.

101 Q. And that leaves a hole in the end of the shell?

A. Yes, sir.

Q. It isn't entirely closed?

A. Not entirely closed, no, sir.

Q. Now then, what do you do next?

A. After the forging is nosed and put in the shape as you see it there, it is taken to the heat treating furnace. There it undergoes heat treating. By that I mean passing the shell through a furnace at a predetermined temperature and for a predetermined length of time, to normalize the steel and put it into such shape that it will stand the physical requirements of the Government.

Q. Does that process that you refer to, have an effect upon what I might imperfectly call the chemical constituency or atomic construction of the steel; that is, is it something that effects a change in the character of the steel?

A. It effects a change in the fibre of the steel.

Q. After you put this steel through this nosing process, and this treating or annealing process, whatever you call it, the steel itself has undergone a modification?

A. It has undergone certain physical changes in the annealing furnace.

Q. Which are necessary in order to make it have the tensile strength and so on that the specifications require for the finished shell?

A. That's right.

Q. Now, what happens to it after that?

A. After we complete our work in the normalizing furnace, then the different heats of steel are segregated according to their numbers, which appear on every piece from the time they leave 102 the steel mill until they are shipped as finished projectiles, and the Government people pick out a certain number of shells from each particular heat, which would run say five hundred shells. Then they take this certain number and make tests for hardness, and then indicate certain other shells from which we would cut test pieces and submit to the physical laboratory for further tests, and once passed there, we are at liberty to resume the operation of that particular heat through the shop.

Q. What happens to them if they are rejected at that stage?

A. They would be melted over.

Q. Go into scrap?

A. Yes.

Q. Not all of the rough forgings that you get are ever completed into finished products?

A. No.

Q. Are there rejections?

A. Quite a number.

Q. So that it doesn't follow because you got one of those pieces, that it ever becomes a part of a projectile?

A. Not necessarily, no.

Q. Now, then, go ahead with your process, after it has gotten into this shape of a nosed forging.

A. The forging is brought back into the shop and the small hole in the open end drilled out to a rough size, about two inches. After that operation it goes into what is known as a swiping operation. The open end of the fuse hole, as it is known from that time on, is bored by three operations to a finished size. That also is a very particular part of the projectile, due to the fact that it is 103 threaded. The mouth of the shell on the open end is beveled slightly, and immediately below the fuse hole any roughness that might have come from the nosing press, is taken out.

Q. You mean in the interior?

A. Yes; immediately below the fuse hole, a matter of an inch at the outside, which would be free from the open end of the shell, about two inches or two and a half, not over that. The forging is then taken from the swiping operation to what is known as the roughing profile operation. The shell is chucked in that operation, and the radius part of the shell or the nose radius, is roughed down to within say sixteenths of an inch of the required finished size. From that machine it is taken to what is known as the finished turn, where the projectile or rough forging is chucked by a small driver, which you can see. It is on the other end of the shell, a small projection on the closed end of the shell. That is known as the driving stud. The shell in the open end has a center piece fitted in and it turns on that center, and also on the center on the driving stud, which you can see is finished all over on the outside with the exception of a small portion known as the bourr-let, which is fourteen or fifteen inches from the closed end. I can't really show you on that rough shell. From that operation the forging is taken to a machine that bevels the nose end, a special radius put on the open end of the forging. From there it is taken to the shop scales, where we get the first preliminary weight. That is necessary by reason of the fact that the finished projectile is limited very closely on weight, and we

get the preliminary weight in the shop at as early a point 104 as practicable, so that we can see whether it is necessary to add a little on if we can, or take some off in the following operations, to get it down within the limit. From that it is taken to the chamfering machine, where the chamfer or boat tail on the closed end of the shell is put on and finished.

Q. What do you mean by that?

A. There is a long straight taper on the closed end of the shell, on the outside, about two inches or two and a half, known as the boat tail. After that operation, it is taken to what is known as the facing weight machine, where the closed end of the projectile and the small driver dog which you see there, are removed, and the weight of the shell or projectile at that point is gotten as nearly as

possible to the required finished weight. From there it is taken on another machine and chucked from the outside surface, with the closed end projecting, and the groove for the baseplate cut in the bottom of the shell.

Q. Explain what that is; what is a base plate?

A. There are several kinds.

Q. That is another piece, is it?

A. That is entirely separate and made up of several pieces.

Q. Give the jury a brief description of what a base plate is.

A. A base plate, in a general way, is an entirely separate steel forging machined to fit in a groove or recess which will be made in the bottom of the forging or projectile, to overcome any danger of there being a defect in the bottom of that original steel forging, which might result in a premature explosion of the shell when it is fired from the gun. The base plate is primarily put there 105 to avoid the premature explosion.

Q. The grain runs in the opposite direction?

A. Yes.

Q. And the purpose of it is to prevent the flare, when the propelling charge is exploded in the gun, from passing through some piping or defect in the shell and igniting the high explosive which is contained in the projectile, and thus causing a premature explosion of the chemical?

A. Yes.

Q. And if it is made of steel it is a separate plate which is below, running the other way, so that the grain runs crosswise of the shell?

A. That's right.

Q. Is it sometimes of other metal?

A. It sometimes consists of three pieces; the first is a flat disc about sixteenths of an inch in thickness. Over that is a copper disc with a little flange on it, which takes the groove that I described as put in the bottom of the projectile; and the lead disc and the copper disc are held in place by a piece of lead which is inserted in the groove under hydraulic pressure. That, I believe, is the most common type in use in this country at the present time.

Q. The purpose of it being to prevent premature explosion?

A. Yes, sir.

Q. And constituting either a separate piece of steel or copper or lead or something?

A. Always a separate piece of material.

Q. The process that you have just spoken of, was the process of cutting the groove, or whatever was necessary, in the bottom of the shell to take that base plate and hold it in place?

106 A. That's right.

Q. What was the next thing you did after that?

A. The next operation, the projectile was again chucked by its exterior surface, with four or five inches of the closed end projecting from the chuck, and the groove or grooves cut for the application of the copper driving band.

Q. What is the copper driving band?

A. The copper driving band is a separate part of the finished pro-

jectile, which engages the breech of the gun and which takes the rifling on the cannon.

Q. That is, it engages the rifling?

A. Yes, and prevents, of course, undue wear on the barrel of the gun.

Q. That is, the piece you speak about now, is that copper piece?

A. Yes.

Q. And that projects slightly beyond the steel piece?

A. Yes, sir.

Q. As you say, engages the rifling in the cannon, so as to give the shell the revolving motion?

A. Yes, sir.

Q. The operation you are speaking about is the cutting of this steel piece, cutting a groove in it, in which this copper band is inserted?

A. That is correct.

Q. What sort of an operation is that?

A. The projectile in that state is chucked from the outside, with four or five inches of the closed end projecting from the chuck; a special tool, the width of the groove required, is run up against the steel, the groove cut to the required depth, then another tool 107 is put in which undercuts the groove already made. In other words, it is a dove-tail job, to keep it from slipping off, and then there is a third and final operation on that particular part, the waving attachment is put on the machine. The waving attachment on that type of shell puts three small serrations, sort of a corkscrew effect, around the band seat, the idea being that when the rifling of the gun engages the copper band, the copper band cannot turn on the seat.

Q. That is, those three lines are cut in the shell?

A. No, not in the shell; they are raised up.

Q. They are raised lines?

A. Yes, sir.

Q. That run around the shell, but they wave?

A. Yes.

Q. They are not parallel?

A. Not parallel.

Q. And the consequence is that when the copper is forced into that place, it is impossible for the copper band to slip on the shell, so that when it becomes engaged in the rifling the shell has got to go around with the copper. Is that the point?

A. Yes.

Q. What is the next point?

A. The next operation is the grinding of the bourr-let. The bourr-let is the raised portion of the shell which you can see, about seven or eight inches above the copper band.

Q. Right here? (Indicating.)

A. Yes, sir. That is ground to a very close dimension.

Q. This piece? (Indicating.)

A. Yes, sir.

108

Q. And how is that made?

A. That is ground in a special machine which chucks the shell on the boat-tail or tapered portion on the closed end, and also on the radius of the open end. The shell revolves and an emery stone revolves at the same time, and is set to maintain a certain size of outside diameter.

Q. What is the function of that?

A. That rests in the rifling of the gun, and is put there to center the shell in the gun.

Q. So that when the shell is slipped into the gun, it rests——

A. Rests only on two points.

Q. And the copper band rests immediately behind the rifling, so that it is held in shape by those two?

A. The copper fits the breech of the gun, and the bourr-let the rifling.

Q. The rest of the shell is a little smaller than the cannon?

A. Yes, sir.

Q. What is the next process?

A. After the bourr-let grinding operation, the threads are cut in the nose of the shell.

Q. That is, the thread into which the nose piece or time fuse is subsequently attached?

A. Yes.

Q. What is the next thing?

A. After the threading of the nose, the various governments who are getting the projectile put the shell through what is known as the preliminary inspection, and all dimensions are checked; all work that has been done to that point is checked there, and if found satisfactory the projectile in that state receives what is known as the Government preliminary bond stamp, which permits you to proceed.

Q. What happens if it doesn't?

A. Rejected as scrap.

Q. Go ahead. What is the next thing?

A. The next thing after the preliminary inspection, the projectile is taken to the band press and there the copper band in its crude state is pressed on.

Q. The copper driving band?

A. The copper driving band. The copper is heated and the shell is placed between a set of six hydraulically operated die blocks, which come in and press the copper into the groove which had already been cut in the projectile body.

Q. I see that looks as if there were three bands on there. Tell us about that.

A. The two grooves which you can see in the band are known as contileurs. That is a French term, I believe. And the function of the grooves, I believe, is to act as a gas check when the projectile is fired. I don't know whether I can explain that. I know they call it a gas check. And it also serves another purpose, that if the copper on the rifling starts to strip back, it doesn't foul itself on the rifling

of the gun, but it has some place to go into, the grove. Just how it would act as a gas check, I wouldn't be prepared to say.

Q. What is the next thing you do?

A. After the copper band is pressed on in its rough state, the projectile is taken to the base plate press, and the base plate, which you can see, is applied.

Q. That is, in this particular shell I have here?

A. That is the three-piece type. There is a lead disc under the copper disc, and the two are held in place by a lead caulking wire, forced by hydraulic pressure into the groove which had been cut in the base of the shell.

Q. If it was a one-piece shell, the recess would be larger?

A. It would be deeper and threaded.

Q. Instead of being pressed by dove-tailing, if it is steel, the plate is screwed in?

A. Yes.

Q. What is the next process?

A. In the next process the projectile is taken to the copper turning machine, where the copper band is turned into the shape in which you see it there, finished. It is sized down for width and diameter, and the contileurs or grooves inserted, all in one machine.

Q. What is the next thing?

A. From there the projectile is taken to what is known as the sand blasting process, where the exterior cavity is blasted out by compressed air and sand or steel shot, to remove all scale, grease and dirt that it may have accumulated, or rust, in the different processes. It might take a week to get from the rough forging stage to the sand blasting process, and in that time it may have rusted on the interior. After it is sand blasted, it is—

Q. Are all these different processes conducted by different men on different machines?

A. Always.

Q. They go from one lathe to another, which is in charge of a different crew, and they are all distinct processes?

A. Yes.

Q. The sand blast is to smooth up the inside?

A. It is really to clean out, more than to smooth it up, although it does have a certain smoothing effect. After that, it is varnished on the inside and placed in a machine, on which the projectile revolves, and a varnish spray is inserted in the inside and withdrawn—

Q. What is the reason or objective of that varnish of the inside?

A. There are several. Primarily, it will keep the interior cavity from rusting or corroding. Then, the varnish as applied acts as a lubricant between the explosive charge which is later inserted, and the steel body of the projectile. The varnish is prepared generally of shellac, what we call gum shellac, alcohol and rosin, and the rosin when it becomes slightly warm gets a little bit sticky, and will sort of act as a cushion or lubricant between the explosive and the body of the shell.

Q. What is the next thing you do?

A. The next thing, after the interior varnishing, is the stenciling on the outside of the body of the projectile, the different required markings, and then weighing, what would be known as the final weighing, the company final weighing. If the projectile is too light, it is scrapped; if it too heavy, there are certain methods that the body outside can be slightly reduced to bring it within the weight limit, atomically.

Q. What is the next point?

A. After the final weighing, the projectile receives what is known as the company final inspection. All dimensions are checked, the thread of the nose and varnish on the inside, and the general finished appearance, and if found satisfactory by the company, the projectile is sent to what is known as the Government bond room, where it is re-weighed and re-inspected in all details, and if found satisfactory there, receives the Government final bond stamp and is ready for shipment.

Q. How about the finishing of the outside?

A. I have described the finished turning operation.

Q. You spoke about varnishing the inside. Is there anything done before shiping, to the outside?

A. In some cases, I believe, in the majority of cases, there is a coat of varnish applied to the exterior of the shell before shipment, as a rust preventive. The copper driving band is protected by several different methods, I think the principal one being the use of a rope grommet. The rope grommet is simply a rope ring, a continuous piece of rope in the form of a circle to fit the shell, and is slipped down over and rests against the copper driving band.

Q. That is to keep it from being marred by being struck by something in shipment?

A. Yes.

Q. Coming now to the shape of this segment, where it has been swed in two, I noticed it is of different thicknesses. Is that an essential and material thing?

A. Yes, unquestionably.

Q. That is, all that has to come to these particular sizes that are specified, all the way through?

A. Absolutely.

Q. And that work is all done after you buy the piece?

A. Always.

Q. That is, getting it to the shape and weight and size that is required to make a complete part of a projectile?

A. That is correct.

Q. That is all done by the operations in your works there at the Standard Steel Car Company?

A. Yes, sir.

Q. We have three pieces, I understand, that are fastened together, the main body of the shell, and the copper driving band and the copper base plate—copper, or lead, or steel, or whatever it may be, but three pieces now that are assembled together. Is there anything else that is necessary in order to complete that as a projectile or shell ready to be fired from a gun?

A. Undoubtedly, it would have to be loaded and the adapter or booster or time fuse applied.

Q. What do you mean by "adapter"?

A. The adapter is a piece that screws immediately into the threaded open end of the projectile, as you see it there.

Q. That is, this projectile as it is finished, as I would put it in my crude way, hasn't any point?

A. No point at all.

Q. You wouldn't fire that out of a gun at somebody?

A. No.

Q. What is the other piece there? I wish you would describe this piece that goes in there (indicating).

A. The adapter would be the one you would hold in your left hand.

Q. Here are some other things (Handing witness several pieces).

A. This would be the adapter and would screw immediately 114 into the nose of the shell, engage with these threads here.

Q. What is that; what is it made of?

A. That is made from steel.

Q. Is that all one piece?

A. This is all one piece, but this is very incomplete in itself.

Q. But that is what you would call a piece of a nose piece?

A. Yes.

Q. That is, considering all the rest of the shell as a nose piece, for the lack of a better name, perhaps, that is one part?

A. One part; yes, sir.

Q. How is that made?

A. Well, I have never been actively connected with manufacturing that piece?

Q. As far as you went in the shell manufacturing business, you stopped with a three-piece part that had the main body of the shell and a base plate and the driving band?

A. Yes, sir.

Q. That is a machine made piece?

A. Simply a specialty machine made piece.

Q. Made from a forging?

A. Made from a forging, undoubtedly. I don't think there is any question about that.

Q. And requiring accurate workmanship?

A. Very accurate work; yes sir.

Q. With a thread on the one end and a thread on the side for something else to screw in it?

A. Yes, sir. That is where the booster would screw.

115 Q. What is a booster?

A. A booster on this particular type of fuse would look very, very much like a piece of pipe about seven or eight inches long which would screw into the thread inside of the adapter. Then on the end of the booster would be a cap which would look something like that (indicating).

Q. Like the cap on the end of that time fuse?

A. Yes, except that it would be sticking up here on a piece of pipe that far, about eight inches. This cap would project perhaps a

fourth of an inch beyond the end of the pipe, and there would be a little piece of wire with a weight on it, wrapped immediately under the cap on the end of the booster pipe. That wire would be wrapped in the opposite direction from the centrifugal motion that the shell gets when it is fired from the gun, the idea being that the little weight on the end of the wire will start to unwrap itself as the shell passes through the air. Then when this strikes an object it fires off a small explosive charge in this booster pipe; that in turn sets off another one down inside the shell, through the adapter. The explosive charge is drilled out, and there is a fuse set down inside the explosive charge. The booster sets off the explosive fuse inside of the high explosive in the shell, and that in turn puts off the high explosive.

Q. That is a simple form of firing?

A. Yes, sir.

Q. Let me call your attention to this rather more complicated looking piece—

A. I might say that that booster has, I judge, fifteen or twenty pieces in it, anyway; probably a few more.

116 Q. That other nose piece that has a time fuse attachment, that you hold in your hand, I wish you would explain what that is.

A. I don't know whether I am competent to do that. I have seen them and I have read some articles on them.

Q. That is an arrangement, anyhow, that screws into the nose of the shell?

A. Yes, sir.

Q. And it is loaded itself with powder?

A. Yes.

Q. The fuse is?

A. Yes.

Q. And it is so arranged with a complicated set of pieces, that the gunner can, by setting the gauge on the edge of it, fix the number of thousands of yards at which the shell will explode?

A. Yes; that is it.

Q. And it will also explode if it strikes before?

A. Yes.

Q. Have you any idea how many pieces that has in it?

A. I would judge there are about seventy-five, from looking at it. I suppose more than that.

Q. There are a great many different pieces of metal that go to make up that piece of the shell?

A. Yes.

Q. And each one of them has been machined itself and brought to an accurate shape so it fits every other piece?

A. Yes; that is right.

117 Q. Then, when you have done all that, have you anything else to do before you have a projectile that is fit to be fired from a gun?

A. No. You must load your shell first.

Q. These are what are known as high explosive shells?

A. Yes, sir.

Q. And their effectiveness when they go over into the German trenches, is due to the force of the explosive they have inside of them?

A. Yes.

Q. Do you know what one of these forgings weighs?

A. Yes, sir.

Q. About how much?

A. About 170 to 175 pounds. They vary somewhat.

Q. In the shape in which you get them?

A. Yes.

Q. What does the steel weigh that is left in the part of the projectile after you get it finished?

A. The normal weight of that particular projectile is 77.45 pounds.

Q. Twice 77 would be 154. So that there is something less than half the steel in weight left?

A. The loss is about 55 per cent on that particular type.

Q. About 55 per cent of the steel that you bought in the shape of that projectile, has been planed away and gone into shavings and scrap, if I may use that expression?

A. Yes, sir.

Q. I don't know whether I get it clear, but this segment of shell which we have before use, has that exactly the same finish 118 outside and inside, as the ordinary projectile does that is made from one of these rough steel forgings?

A. You mean the finish on that particular piece?

Q. Yes.

A. It is just a little better than ordinarily.

Q. A little bit smoother?

A. Not on the interior.

Q. The interior is exactly the same?

A. Yes.

Q. How about the exterior?

A. That shell was put through what we call a buffer process, to smooth it up.

Q. This is perhaps a little brighter and a little bit smoother than the ordinary finished shell?

A. Yes.

Q. I call your attention to a tracing which is marked plaintiff's Exhibit "L," and ask you what that is?

A. I would say that is a drawing of a rough forging, with a finished projectile superimposed thereon.

Q. Was this made under your direction?

A. No.

Q. What are the black lines?

A. The black lines would indicate a rough forging of the type which you have there.

Q. And the red line would show what was left of the steel in the finished projectile, and the shape that it takes?

A. Yes,

Q. I show you Exhibit "M." What does that show?

119 A. That shows the nosing operation on the rough forging, as described a little while ago.

Q. That is, it shows the way, after the end has been heated, it is pressed in to make the nose?

A. Yes.

Cross-examination.

By Mr. McGinnis:

Q. Did you always start your manufacturing of the Standard Steel Car Company at this stage?

A. The manufacture of projectiles at the Standard Steel Car Company is always started at that stage.

Q. Did you ever make any forgings at the Standard Steel Car Company?

A. Yes, sir.

Q. Where did you start your process for that?

A. From the small billet or block.

Q. Then you don't always start making these materials out of forgings. You start even back further sometimes, at the billet. Is that right?

A. No. I said in the manufacture of the finished projectile we start always with the forging.

Q. Then you also make forgings in your plant?

A. Yes, sir.

Q. In other words, you start making the forging from the long bars, nick them off just as that is nicked there?

A. Yes.

Q. And then complete it from there on?

A. Make forgings out of them; yes, sir.

Q. And sometimes you buy them made up that far?

120 A. Sometimes we buy them made up that far, yes, sir.

Q. I want to ask you if all the material is in that rough forging that is used in the shell shape—in fact, not only all the material, but more than all?

A. I don't believe I understand you.

Q. (Question read.)

A. You mean that all of the material which is represented in the finished projectile is originally in this rough forging?

Q. Yes.

A. No, sir.

Q. The shell-shape, I said.

A. If I understand your question, I would say no.

Q. This is composed of a certain material?

A. Yes.

Q. I want to know if not only all this material is in that, but more than that?

A. Yes, sir.

Q. So that the party who made this forging here not only made

enough of this kind of material for the shell, but made more than enough?

A. That is quite true.

Q. The party that makes the base plate is the Forged Steel Wheel Company or the Standard Steel Car Company?

A. No.

Q. That is made by another concern?

A. Yes.

Q. And the copper band, is that made by the Standard, or is that furnished you by another party?

A. They are furnished by outside concerns. As a rule, the 121 Governments furnish them themselves. Where they get them we don't know.

Q. And another party furnishes these (indicating)?

A. I presume.

Q. And another party furnished these (indicating)?

A. Yes.

Q. And this nose piece you say is made—

A. That is a time fuse.

Q. This nose piece is made up of seventy-five parts?

A. I would say at least that many, yes, sir. I didn't stop to count them.

Q. It may be that seventy-five different manufacturers made each one of these parts?

A. Hardly.

Q. You stated there is a fuse added, or a fuse pipe?

A. A booster, I think I called that.

Q. By whom is that made?

A. I couldn't tell you that.

Q. It is not made by the Standard Steel Car Company?

A. No, sir.

Q. Did I understand you to say that even the varnishing was done by machinery?

A. Yes, sir. Some people do it by hand, but we do it by machinery.

Q. You have had a good many of these up in the Standard Steel Car Company's plant in the last three or four years?

A. Yes, sir.

122 Q. What do you call them?

A. The most common term applied is rough forgings.

Q. Did you ever hear them called shell forgings?

A. I have.

Q. Isn't that what they are regularly called?

A. No, sir, not in our establishment. We would call them pipe forgings or rough forgings.

Q. Have you seen the contracts your company had with other concerns making those forgings?

A. No, I have not.

Q. But you can't tell us that by all the employes in your plant, or everybody in your plant, these are known as forgings instead of shell forgings?

A. Rough forgings, as a rule. That is about all we hear them called.

Q. When you make shell forgings, do you make according to specifications?

A. As to size?

Q. As to material and size?

A. Well, we would be furnished the material from which to make the forgings.

Q. When you make the forgings in your own plant, which I understand you do, I ask if you make them according to specifications both as to material and the shape?

A. I don't want to be misunderstood. The material would be furnished to us. We are not steel makers. The material would be furnished to us and would have to meet the specifications before we would get it.

Q. When you start out to make shell forgings, how does the material come to you?

123 A. In the majority of cases in the form of a block, the small block you see there.

Q. Does it ever come to you in bars like that (indicating Ex. "H")?

A. At one time, yes, long ago.

Q. I show you Exhibit "K," and ask you what that represents?

A. A block in the form that we see, a rough forging through the piercing operation, and I take it, through the drawing operation.

Q. Does that require a distinct operation for each one of those blocks shown there?

A. The piercing operation is a distinct operation from the drawing operation.

Q. Is this Exhibit "M," picture No. 1, that represents this block here cut off?

A. Yes.

Q. That is one operation?

A. Yes.

Q. Then No. 2 is an operation in between—this is not the next operation from this?

A. No.

Q. And picture No. 2 represents an operation whereby this is transformed to a certain extent?

A. Yes, in practically the shape but not quite so long. The drawing operation is merely to elongate the cylinder.

Q. As I understand, this part here is heated and then it is put through a press and punched?

A. Yes.

Q. That is one operation?

A. Yes.

124 Q. Then it is taken out and put into other machinery, rings I believe you called them?

A. Rings held in the hole through which the forging is passed.

Q. Then that passes through one or two or three operations?

A. No, just one; it is all one operation.

Q. So then there are two operations in between here?

A. No, just one.

Q. If I understand you aright, this is taken and heated and punched?

A. Yes.

Q. Then it is taken through rings and drawn out?

A. Yes.

Q. And drawn into this (indicating)?

A. Yes.

Q. After being punched this passes through several rings?

A. All in one operation, though.

Q. So there is another operation in here not shown?

A. Yes, one operation not shown.

Q. Not shown in this picture?

A. It is shown in the picture.

Q. And No. 3; will you explain what that is?

A. No. 3 would be the forging after it had passed through the drawing press in the shape you see it there.

Q. What do you call this?

A. I would call that a rough forging after it had passed the rough turning operation.

Q. You say you manufacture both from here up and up to here (indicating)?

125 A. That is correct.

Q. I will ask you if you knew what you were manufacturing when you manufactured from here to here (indicating), that is, from the rough billet cut off up to the forging?

By Mr. Gordon: It is not material what the superintendent of the Standard Steel car Company did.

A. We undoubtedly did, yes.

By Mr. McGinnis:

Q. Will you state whether or not you started out to make a shell in performing these operations?

By Mr. Gordon: If he knows.

By the Court: He is simply describing the processes the company goes through. I think the knowledge of this witness at this time is not competent. The objection is sustained.

Redirect examination.

By Mr. Gordon:

Q. Did you count these number of pieces that you testified to or will I have to count them?

A. I can count them. Twenty-seven.

Q. Twenty-seven distinct processes that you described here, that this piece of metal, this rough steel forging goes through with before it is finished into the complete nose of the shell?

A. Yes, that is correct.

By Mr. Gordon: I offer in evidence the photographs in connection with the testimony of the witness, being Exhibits "H", "I", "J", "K", "L", and "M."

Q. I call your attention to the five photographs which have been marked Exhibits N-1 to N-5, inclusive, and I wish, starting at N-1, you would tell us what that represents.

A. N-1 represents a block of steel ready for forging, such as that one we have on the floor.

Q. That is a solid round?

A. Yes. N-2 would represent a completed rough forging, the same as represented in the pierced piece. N-3 is a rough turned shell.

Q. The same piece after it had been rough turned, an N-4?

A. N-4 would represent the shell as the forging after being nosed. N-5 the finished projectile or shell.

Q. That is, you mean the finished projectile all except the nose piece, and the explosive?

A. Yes, sir.

127

Testimony of William Bierman.

WILLIAM BIERMAN, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Where do you live?

A. Pittsburgh.

Q. What is your business?

A. Secretary of the Standard Steel Car Company.

Q. And secretary of the Forged Wheel Company?

A. Secretary of the Forged Wheel Company also.

Q. Those two companies are allied companies?

A. Yes, sir.

Q. And you have had occasion to make contracts along over the war period for steel and projectiles, etc?

A. I have been connected with the making of them, yes, sir.

Q. Did the Forged Steel Wheel Company ever have any contracts for any complete projectiles?

A. No, sir.

Q. Did the Standard Steel Car Company?

A. No, sir.

Q. Did the Standard Steel Car Company have contracts for the finished steel part of the projectile?

A. For the body part, yes sir.

Q. You have had contracts for those?

A. Yes, sir.

128 Q. There was a good deal of buying and selling, I believe, during the year 1916 of forgings and steel that were used in projectiles and parts of projectiles?

A. Yes, sir.

Q. Were you acquainted in that year with the market value of the steel forgings and of the finished steel part of the projectile that was subsequently fabricated from the forging?

A. I was familiar with the value of the rough forging, but not with the finished part so well.

Q. I mean the finished steel part.

A. That is, in the form it is there?

Q. Yes, the machine part.

A. The machined body, yes.

Q. What I want to get at is simply the relative value of the two. What was the value of say a 6-inch projectile, and the forging intended for a 6-inch projectile, in 1916, such as we have here before us, and such as the Forged Steel Wheel Company made?

A. On an average of \$8.50.

Q. Apiece, do you mean?

A. Yes.

Q. What was the value of the steel part of the finished projectile that was made out of that piece that was worth eight fifty?

A. If it was in machined form, about twenty.

Q. That is, we may look at it from the steel standpoint, the steel that was included in this forging increased in value from eight fifty to twenty?

A. Through the machining operations, yes.

Q. And that was the value of work that was done on it from that point on?

A. Yes, sir.

129 Q. Not only the machining but the forging of the nose and the heating and everything, the treatment and everything else that had to be done in connection with it?

A. Yes, all processes through which the material had to be put from the rough forging until the finished body state.

Cross-examination.

By Mr. McGinnis:

Q. You mean to say eight-fifty included the cost and material and work already done?

A. The cost of the material and the forging work, including the profit. That would be the selling price of the rough forging.

Q. And twelve dollars' worth of additional work was put on and material added to it?

A. Approximately, yes.

By Mr. Gordon:

Q. Did you catch the question?

A. Yes.

Q. Work and materials?

A. Well, material. There is really no additional material that was furnished ordinarily, in the machining of the body. As Mr. Hoelsel testified, the copper band and the base disc and the caulking wire would be furnished by the Government usually, in some special form.

Q. You just meant it really only represents work?

A. Yes, the processes.

130 By Mr. McGinnis:

Q. Can you state how much of the eight dollars represents work and how much material?

A. You say for the forging?

Q. Yes.

A. Approximately \$5.75 to \$6 would represent the material, the balance the forging charge.

Q. Then there was at least \$2.25 worth of work done on this forging at this stage?

A. Yes, to take it from the round steel bar into the forging form.

Q. Did you have anything to do with the contracts for the British Government or Baldwin Company or the other concerns for whom these forgings were made?

A. With the actual making of them?

Q. Or signing.

A. Not direct negotiations; the final signing of them, yes.

Q. Can you produce them?

A. I believe they are here.

131 *Testimony of Charles Graham Bacon.*

CHARLES GRAHAM BACON, a witness called on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Where do you live?

A. Pittsburgh.

Q. How long have you lived here?

A. Fourteen years.

Q. What is your business?

A. Assistant to the president of the Forged Steel Wheel Company.

Q. Are you connected with the Standard Steel Car Company also?

A. No, sir.

Q. Were you familiar with the contracts that you had for the furnishing of rough steel forgings for shells in 1916?

A. Yes, sir.

Q. Did you have many of those contracts or otherwise?

A. We had quite a few of them. I should say ten or twelve or fifteen.

Q. Made at different times in the year?

A. Yes, sir.

Q. With different people?

A. With different people, yes, sir.

132 Q. And for different sizes?

A. For four or five different sizes.

Q. With whom were those?

A. Some were with Morgan & Company, some with the Baldwin Locomotive Company, some with the American Brake Shoe & Foundry Company, some with J. G. Brill Company of Philadelphia, and several different machine shops in this country and also abroad.

Q. Were they all for material in the same stage of manufacture?

A. forgings?

Q. Yes.

A. Yes, sir. We also sold steel from which forgings were made.

Q. That is, you not only sold some forgings but you sold some steel?

A. Steel to manufacturers of forgings. The form in which that steel was usually purchased was in rounds for the making of projectiles.

Q. And did you carry the processes yourself in the works of the Forged Steel Wheel Company beyond this rough forging stage?

A. No, sir.

The contracts being produced by Mr. Gordon, they were handed to the defendants' counsel with the suggestion that he should call attention to any parts of them that he desires to have in evidence.

By Mr. McGinnis: I should like to have them all in evidence, although if an appeal is taken perhaps we can agree on one contract then, but for time being I should like to have them offered as one exhibit.

133 By Mr. Gordon: I do not care about offering them at all, but I have them here so that the United States can make any use of them they wish, and if they wish to cross-examine the witness about them, he is the man who knows all about them. From my standpoint of the case, I do not care about them at all.

By the Court: You can bring out anything from the contracts you desire, on cross-examination.

By Mr. Gordon:

Q. I want to ask you about this question of specifications for these shell forgings, as to the character of the steel contained in them, and whether or not that is different from other steel that you manufacture?

A. Of course, it is different in a way. We manufacture all different grades of steel. Nearly everything is made to some distinct specification, but as to this steel being anything that was specifically

for forgings or for shells, it was a common commercial product, and I would like to bring out the point that this steel when used by us in the making of forgings, was in the form of blooms. When it was in the form of blooms, we could have rolled it into any one of a hundred or five hundred different commercial shapes, and it was nothing extraordinary. We could have used it for other purposes. We were not compelled to go ahead and use it for the manufacture of these forgings. It was a commercial grade of steel. And, in fact, we not alone could have but we did use it in a number of other different ways.

134 Q. What ways?

A. For crank shaft, parts of locomotives, angles for cars, rails, cold drawn material, shafting. We had a demand for this very grade of steel that exceeded our output five or ten times over.

Q. There was no trouble about selling it?

A. No, sir. Simply this particular grade was used for this particular work just the same as other grades are used for other work; but this same grade was applicable to a number of other commercial items that we were regularly selling.

Q. That didn't make any difference in the cost value or anything of that sort, from the other grades and other uses?

A. No, sir.

Q. It was not a specific and expensive process of making steel, or anything of that kind?

A. No, sir. It was steel that we are regularly making. Our wheel steel that we are making day after day costs us practically as much.

Cross-examination.

By Mr. McGinnis:

Q. You stated you had ten or fifteen contracts with other concerns, all told. Is that correct?

A. Ten or fifteen?

Q. Yes.

A. I would say roughly, there were in the neighborhood of ten or fifteen, orders and contracts.

Q. In all those contracts did you sell the product by the pound or by the piece?

A. Forgings by the piece, so much per forging.

135 Q. How do you sell your regular rounds?

A. By the pound.

Q. In all these contracts did you agree to manufacture forgings for shells?

A. They were forgings to certain drawings which said they were to be used in the manufacture of shells, yes, sir.

Q. I show you Government Exhibit No. 1, and ask you to state if you know what that is.

A. It is a contract between his Britannic Majesty's government and the Forged Steel Wheel Company, covering 9.2 forgings. The Forged Steel Wheel Company did not make the forgings.

By Mr. Gordon:

Q. What did it cover?

A. It covers 9.2 forgings. The Forged Steel Wheel Company made the steel but did not make the forgings. This covers forgings.

By Mr. McGinnis:

Q. You say forgings for high explosive shells?

A. It says forgings for high explosive shells.

Q. Was this drawing attached to the contract, as part of the contract?

A. It was, sir.

Q. You said that the Forged Steel Wheel Company did not make these forgings?

Q. Will you state who did make them?

A. I think they were made by the Standard Steel Car Company.

Q. How did the Standard Steel Car Company come to make them?

A. We gave them an order for them, sublet the contract.

Q. Who did?

A. The Forged Steel Wheel Company.

Q. The Forged Steel Wheel Company contracted with the Standard Steel Car Company to make the forgings for shells provided for by that contract?

A. The forgings called for by that contract.

Q. I show you Government Exhibit No. 2, and ask you to state if you know what that is.

A. It is a contract with the J. G. Brill Company, between Brill Company and the Forged Steel Wheel Company, under which the Forged Steel Wheel Company agreed to furnish the J. G. Brill Company either with rough forgings or with blocks of steel for the manufacture of rough forgings.

Q. Can you state which was furnished under that contract?

A. I think the majority of it was forgings and a small percentage of blocks of steel which they made.

Q. That is, it stipulates they are 6-inch forgings for shells?

A. It does.

Q. And the blue-print attached, is that a part of the contract?

A. Yes, sir, that is a part of the contract.

Q. I show you Government Exhibit No. 3, and ask you to state what that is.

A. An agreement between the Forged Steel Wheel Company and the American Brake Shoe & Foundry Company.

137 Q. What do you agree to furnish there?

A. Twenty thousand of the 9.2 shell forgings.

Q. Here you call them explosive Howitzer shell bodies?

A. Shell bodies.

By Mr. McGinnis: If there is no objection I would like to offer all the remaining contracts as one exhibit.

By Mr. Gordon: There is no objection.

By Mr. McGinnis:

Q. Are the Forged Steel Wheel Company and the Standard Steel Car Company manufacturing corporations?

A. Yes, sir.

Q. All the business in connection with the making of these forgings up to this point, was handled either by the Standard Steel Car Company or the Forged Steel Wheel Company?

A. Up to that point by either one of the two companies.

Q. I will ask you to state whether all of the forgings that were made by the Standard Steel Car Company for the Forged Steel Wheel Company, were made under agreement between those two companies?

A. Yes, sir.

Q. So that the Standard Steel Car Company agreed to make the forgings in question for the Forged Steel Wheel Company?

A. Yes, sir.

138 Q. And for all the steel forgings in question, the Forged Steel Wheel Company sold to other concerns at a profit?

A. We sold the forgings to other concerns.

Q. Of course, you made a profit?

A. I hope so.

Q. Do you know anything about the original returns that were filed?

A. I may have seen them. I am not familiar with the details of them.

Q. I show you Exhibit "A" with the plaintiff's Statement of Claim, and ask you if you know what that is?

A. I don't think I ever saw it before. I never saw it before, no, sir.

Q. I call your attention to No. 2 "Raw Materials. Enumerate principal raw materials used in the manufacture of articles coming within the terms of the law," and the answer is "Billets and bars." Did you regard that as raw material at that time?

Objected to as not cross-examination.

Objection sustained.

Redirect examination.

By Mr. Gordon:

Q. Did you sell these rounds to any other people besides the forging themselves?

A. Yes, we did.

Q. In large or small quantities?

A. Very large quantities; that is, large for us. It wouldn't be large for a large concern.

130 Q. Did you sell some to the National Tube Company?
A. Yes, indeed, sir. I should say in the neighborhood of forty or forty-five to fifty thousand tons to the National Tube Company.

By Mr. McGinnis:

Q. Did you sell it by the pound or by the piece?
A. The rounds to the National Tube Company were sold by the pound, as steel always is.

Testimony of D. H. Ramsbottom.

D. H. RAMSBOTTOM, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Where do you live?
A. Pittsburgh.
Q. What is your business?
A. Assistant general manager of sales of the National Tube Works.
Q. How long have you been with them?
A. Since 1887.
Q. Are you familiar with the sales of materials?
A. Yes, sir.
140 Q. Did the National Tube Works sell any materials to projectile manufacturers?
A. Yes, sir.
Q. During the war?
A. Yes, sir; shell body forgings.

By Mr. McGinnis: I should like to have an offer. I do not know what this has to do with this case.

By Mr. Gordon: We propose to prove by the witness and others, that these black shell forgings were the ordinary shape in which munitions manufacturers purchased their raw material. That was the ordinary point at which the manufacturing of shells began.

By Mr. McGinnis: It is immaterial to this case whether it was the usual practice to manufacture these up to a certain stage and hand them over to some one else, or whether they manufactured them a little further and handed them over to some one else; or whether they did part of the manufacturing in their own plant and shipped and sold them to other concerns partly manufactured. We have no objection to their showing what the general custom of the trade was, if it has anything to do with this case.

By the Court: I think we will hear the testimony, the legal effect of the evidence being for further consideration. The objection is overruled and an exception granted to the defendant.

III By Mr. Gordon:

Q. Do you mean such forgings as that which we have before us here on the floor, these pierced rough forgings?

A. Yes, the rough forgings.

Q. To whom did your company have occasion to sell those?

A. We sold the English government, sold other concerns, sold to Canadian Car & Foundry Company, the Washington Steel & Ordnance, and the British Government direct, and the Westinghouse Electric & Machine, Bartley & Haworth of Baltimore. We had a great many contracts, but those are the largest we had.

Q. Did you make them and sell them in large quantities?

A. Very large quantities.

Q. What do you mean by that?

A. Half a million or a million.

Q. At a time?

A. At a time.

Q. Did you make some steel yourself and buy some steel?

A. We bought the rounds.

Q. And did forging?

A. Simply the forging work.

Q. And then you sold the forgings?

A. Yes, sir.

Q. By the million to different people?

A. Yes, sir.

Q. You bought some of the steel from the Forged Steel Wheel Co?

A. We did.

Q. Were these forgings in ordinary shape in which the munition manufacturers bought their material at that time for steel?

A. That is my understanding, that was the case.

Q. That was your experience?

A. Yes, sir.

Q. That was the shape in which they bought from you?

A. Yes, sir.

Cross-examination.

By Mr. McGinnis:

Q. You made these rough forgings under contract?

A. Yes.

Q. Will you state what the contract called for?

A. Some of them just called for certain sized forgings from our department, and others shell body forgings.

Q. Did the blueprint show a shell?

A. It showed the rough forging, the dimensions.

Q. Showed it as part of the shell—did the blueprint show it as part of a shell?

A. The blueprint that we worked to would be a forging like that, rough forging.

Q. But your specifications—I assume they were manufactured according to specifications?

A. Yes, sir.

Q. Did you know what the material was to be used for?

A. I had a very good idea.

Q. Did you know?

A. I suppose it would be used for a shell.

143 Q. Was that what you contracted to make it for?

A. No, sir.

Q. The specifications didn't call for——

A. They called for shell body forgings.

Q. Then you manufactured from the billets up to this stage?

A. No, sir.

Q. What did you do?

A. We bought the rounds.

Q. Aren't the billets the rounds.

A. No, sir.

Q. Well, say from the rounds.

A. Yes, sir.

Q. You cut them off?

A. Nicked and broke them.

Q. And heated them and punched them?

A. Yes, and drew them.

Q. So it was finally in this shape (indicating)?

A. Yes, sir.

Q. Did you do that work for a specific purpose?

A. I don't quite understand your question.

Q. Were you manufacturing these just for pleasure or for shells?

A. For profit.

Q. And you didn't know what they were for?

A. I think I did.

Q. Do you know what they were called? Do you know what this is called, around your plant?

A. Usually a rough forging.

Q. Did you ever hear them called shells?

A. Yes, I heard them called shell body forgings. The usual term is rough forgings.

144 Q. Did you have separate departments for this work?

A. Yes.

Q. What did you call that department?

A. Where we made this was our Christy Park plant; we make all our specialities there.

Q. Was it ever known as your shell plant, or always known as your shell plant?

A. No.

Q. Were the Government inspectors there?

A. Yes, sir.

Q. Did they test your steel?

A. Yes, they took tests.

Q. Inspected the forgings?

A. Yes.

Q. Did your company make a munition tax return?

A. I couldn't answer that. That would go through our treasury department.

Objected to as irrelevant.

Objection sustained.

Q. Did you sell these forgings by the piece or by the pound?

A. By the piece.

Q. How do you usually sell raw material, for anything?

A. You see, we are pipe manufacturers. We sell by the foot.

Q. So this was something new for you?

A. Yes.

145 Q. And something special?

A. Well, not special in a way, because we have our works where we draw this seamless drawn material, and press work, forge work; so it really isn't special with us, in that particular works.

By Mr. Gordon:

Q. The forgings are generally sold by the piece?

A. I suppose lot of forgings are sold by the pound too, various kinds of forgings, but these forgings have all been sold by the piece.

By Mr. McGinnis:

Q. What else did your company manufacture besides pipe and forgings for shells?

A. Boiler tubes, seamless tubes, both welded and seamless process.

Q. Have you any contracts with you that you had with any of your concerns?

A. No, sir,

Q. You stated you think you knew what these forgings were to be used for?

A. Yes.

Q. Will you state what that was?

A. For shells.

By Mr. Gordon:

Q. Among the other things you make, you make gas containers?

A. Yes, cylinder.

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Testimony of W. D. Uptegraff.

W. D. UPTEGRAFF, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Where do you live?

A. Pittsburgh.

Q. How long have you lived here?

A. All my life.

Q. How long have you been connected with the Westinghouse Company interests?

A. Almost thirty-nine years; thirty-nine years on the first of March.

Q. Were you connected with the Union Switch & Signal Company in 1916?

A. Yes, sir.

Q. In what capacity?

A. President.

Q. Was that company at that time engaged in making any munitions?

A. Yes, sir.

Q. Projectile work?

A. Yes, sir.

Q. Did you have contracts for furnishing projectiles?

A. Yes, sir.

Q. What size of projectiles were made?

A. We were making 4½-inch and 5-inch high explosive shells.

Q. You are also director of the Westinghouse Air Brake Company?

A. Yes, sir.

Q. Do you know what they were doing in the munition line at that time, in 1918?

A. They were making 3-inch shrapnel and time fuses.

Q. About how many did they make?

A. They made a million and a quarter of the shrapnel, and they made a good many more, I can't tell you how many more time fuses.

Q. These are rather complicated nose pieces we have here?

A. Yes. We also made some cartridge cases for the containing of the explosive charge. Their contract for shrapnel was for complete shrapnel.

Q. Which was not only what we might call the billet but also the cases that contain the propelling charge of powder into which the steel projectile is fitted?

A. Yes.

Q. Just the same as a revolver or rifle?

A. Yes.

Q. Are you familiar with the work that was done by the Westinghouse Machine Company and the Westinghouse Electric Company?

A. Yes. They were making shells from 3 inches up to I think 15 inches.

Q. I believe you are connected with the Carbon Steel Company of Pittsburgh?

A. Yes, sir.

Q. They have also done some projectile work?

A. Yes, sir.

148 Q. I wish you would state in what shape—take the Union Switch & Signal Company and the Westinghouse Company—in what shape did they purchase their steel which they used in making projectiles?

A. They brought the rough forgings, which in all cases—nearly all cases—is identical with that rough forging there. We understand that as a flower-pot shell, that rough forging there. Most all of the shells are what we call a flower-pot shell. All we had to do with were flower-pot shells.

Q. Just an ordinary, straight cannon flower-pot forging?

A. Yes.

Q. Then they did the machining and fabricating of it?

A. Yes.

Q. I believe you know a good deal about the projectile business as it was at that time, from your personal experience with these companies?

A. We tried to know a little about everything that was going on in the United States and Canada, because this matter of manufacturing shells was a new job, and every factory thought it had the best method, and we tried to keep in touch with all of them and take the best out of everybody's, for ourselves, and they all did the same, so we passed it around.

Q. What was the general custom of the trade in the United States as to how they bought their steel, the raw material?

A. The contracts were generally taken by companies who did the finishing, and they bought all of the different supplies that went into making shells. They bought the rough forgings from the

149 forge people, and they bought the copper tubing out of which the bands were made, from concerns like the Standard Underground Cable Company, who made copper tubing, and they bought the base plates from concerns that forged base plates, and they bought the adapters from people that made those, and so on. They bought as much as they could. It was really an assembling proposition, when you come down to it, because it was all one man could do to look after that.

Q. And machining?

A. Yes.

Q. The man who made the projectiles bought the ordinary shape we have here, a flower-pot shape?

A. Yes, sir. That sort of forging was not general in the country at that time.

Q. And sometimes was the steel brought in castings instead of steel forgings?

A. At that time, I doubt whether on these small shells there was any cast steel, particularly in this country, as they wouldn't stand for cast blanks as we called them. In Canada they used blanks for this sized shell and smaller.

Q. You call them blanks, do you?

A. Yes. I would call them just an ordinary shell blank. It is called a rough forging generally, around the works, but in the

contract or specification I think you will find they are called shell blanks.

Cross-examination.

By Mr. McGinnis:

Q. State whether this forging had all the steel necessary in it for a shell, or not.

150 A. Yes, it had all the steel and about as much more as is needed, and they all have about the same. Most all forgings have shells containing about twice as much metal as is contained in a finished shell, and that is cut away, and I might go on and tell you that in making that shell, the manufacturer who made the steel had to make ten per cent. more probably, because of the nicking and accidents, and so on, to the bars. We made them from the bars sometimes, and we found it took about ten per cent. more. For instance, the inspection department will take so many of each one of those lots, and cut them up for samples, and that destroys them. So the man who makes the forgings must put ten per cent. more than he really needs.

Q. But in any event, this forging has all the steel manufactured that is necessary for a shell?

A. A shell body. Of course, if you have to put in a base plate and adapter, you have to get that somewhere else.

Q. You also buy copper bands?

A. Some people buy copper bands, but in our experience we bought the tubing and cut the bands.

Q. Did you finish the bands?

A. You can't buy a band finished on the shell. It must be finished on the shell. It is applied by hydraulic pressure.

Q. Then you bought the copper bands?

A. We bought tubing and cut the pipe into the width necessary to make the bands. Then there are little set screws and all sorts of things that go with shells.

Q. Did you buy this portion or make it (indicating)?

151 A. Not depending upon the size of the shell, this may be made out of a bar, or it may be made out of a forging. In a 4.5 shell this is cut off a bar with an automatic machine. It is called soft screw steel.

Q. Did you make that in your own plant or did you buy it?

A. I didn't make this at all.

Q. I mean like this.

A. When we made anything of this sort, we made it in our own plant, yes, sir.

Q. And this nose piece the same?

A. These were made—We didn't make these at the Union Switch & Signal. They were made at the Westinghouse Air Brake, when they made them.

Q. Was that finished complete when you bought it?

A. The Switch & Signal Company never handled these.

Q. And you never completed a complete shell?

A. No. We completed the shells up to that state, including the transit plug, ready to ship abroad. These shells are not loaded in this country when they are for England.

Q. Are the nose pieces put in this country?

A. It depends upon the kind you sell them for. These are sold as a commercial commodity and in the munition business are separate and distinct from any shell.

Q. It is a part of a shell?

A. Yes, sir. This is a time fuse for a shell. These time fuses are different fuses. The ones we used generally is called the American fuse.

152 It is a time fuse. As you see here, it is set like a lock on a safe. This fuse to be complete must be charged with powder, and in the manufacture the great difficulty is to get the powder drained to run according to this mark; but the fuse itself is a separate commodity; and we made fuses without making shells for them. We made adapters and we made base plates, and things of that sort, and sold them distinctly apart from shells.

Redirect examination.

By Mr. Gordon:

Q. The Westinghouse Air Brake Company machines all those fuses?

A. They made at least a million and a quarter. These were made at Wilmerding and loaded at Providence, Rhode Island, in a special plant to take care of the fuses made by our company, and the American Locomotive Company and the New York Air Brake Company.

By Mr. McGinnis:

Q. I understood you to say that you did the finishing work on these forgings. Is that correct?

A. On forgings exactly like that, but not that size. Our forging at the Switch & Signal Company was a 5-inch; at the Westinghouse they make them I think as high as 15 inches.

Q. And then you started to do the finishing, the material had already been produced in this form?

A. Yes, sir. That is the way we bought them. When the manufacturer fell down, we made them into that form ourselves. We bought the bars.

Q. You did some of that work yourself?

A. Yes.

153 Q. Then you started the stage of manufacturing sometimes from bars, from which these were cut?

A. Yes, sir.

Q. And heated them and punched them again?

A. Yes.

Q. And rolled them through rings and drew them out into this shape?

A. Yes; sometimes.

Q. And then again you started here? (Indicating.)
A. Yes.

By Mr. Gordon:

Q. You started to forge, as I understood you, when the manufacturer fell down on it and you had to do some yourself?

A. Yes. That is, originally we bought from the Cleveland Crane & Engineering Company. They entered into a contract, and they fell down. The Hydraulic Forge Company at Elwood City made a contract, and fell down. And the Allegheny Steel Company and William Tod of Youngstown, and half a dozen others undertook to supply these and fell down, and we were finally compelled to put in a forging plant of our own, which we did. Then we bought the bars in proper lengths, about 12 feet, from the Republic Iron and Steel Company, but we were like others, we would have preferred to buy just that shape there, but we couldn't get them and therefore we had to make them.

Adjourned until Friday, January 3, 1919, at ten o'clock A. M.

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Friday, January 3, 1919, at ten o'clock A. M.

William Bierman—Recalled.

WILLIAM BIERMAN, recalled, testified as follows:

Direct examination.

By Mr. Gordon:

Q. I wish you would state whether or not the Standard Steel Car Company paid the 12½ per cent. tax on its profits, where it forged some of these bars for this Forged Steel Wheel Company?

A. It did.

By Mr. McGinnis:

Q. Did it pay taxes on the profits realized from the sale?

A. On the profits realized from its billing for the work done. On all of its business in that line, during 1916.

Q. The Standard Steel Car Company didn't sell these materials at all?

A. They did in some cases; in other cases—

Q. I mean the ones in question.

A. No. They merely charged the Forge Steel Wheel Company for doing the work.

155 By Mr. Gordon: I offer in evidence the deposition of W. F. Battin, which was filed on the 19th day of December, 1918.

Deposition of W. F. Battin.

Filed December 19, 1918.

Taken by consent on the 18th day of December, 1918, before Clara I. Houston, Notary Public. All exceptions, except as to the competency and relevancy of the evidence, are waived.

Appearances:

Mr. George B. Gordon, for plaintiff.
Mr. B. B. McGinnis, for defendant.

156

Testimony of W. F. Battin.

W. F. BATTIN, being duly sworn, testified as follows:

Direct examination.

By Mr. Gordon:

Q. Mr. Battin, where do you live?
A. Ridgewood, New Jersey.
Q. What is your business?
A. Assistant Comptroller of the American Brake Shoe & Foundry Company, 30 Church Street, New York.

Q. That is the location of your office?
A. Yes, sir.
Q. Were you connected with that company in the year 1916?
A. Not in that year.
Q. When did you become connected with it?
A. In 1917.

Q. Are you familiar with the taxes that were paid by that company in the year 1917 on 1916 business?
A. Yes, sir.

Q. Are you familiar with the munition work that was done by your company in the year 1916 and reflected in your 1917 returns?
A. Yes, in a general way.

Q. Do you know whether your company purchased steel forgings from the Forged Steel Wheel Company for fabrication into munitions?

157 A. Yes, sir, we purchased forgings from them.
Q. Have you looked over the accounts of the company to see what forgings were purchased in the year 1916 from them?

A. Yes, sir, I have looked over the accounts of the Hudson Metals Products Company.

Q. What connection did the Hudson Metal Products Company have with this matter?

A. That was the company which actually paid the money to the Forged Steel Wheel Company for these forgings.

Q. What was the relationship between that company and the Brake Shoe & Foundry Company?

A. The Hudson Metal Products Company had the contract for these projectiles with the British Government and the Brake Shoe Company did the actual work of machining and other processes.

Q. Was there a munitions tax paid on the profit that the Hudson Metal Products Company and the American Brake Shoe & Foundry Company made on projectiles that were made from these forgings?

A. The Hudson Products Company paid the munition tax for 1916 on all the projectiles made in that year.

Q. If I understand you correctly, the Hudson Metal Products Company had a contract with the British Government for projectiles and they purchased from the Forged Steel Wheel Company the pierced forgings which they subsequently used in the manufacture of these projectiles. Is that right?

A. Yes, sir.

Q. And paid the tax, that is, the Hudson Metal Products Company paid a tax on all the profit that they made from the manufacture and sale of projectiles?

158 A. The Hudson Metal Products Company paid the munition tax on whatever profits they made.

Q. In the manufacture and sale of projectiles?

A. Yes, sir.

Cross-examination.

By Mr. McGinnis:

Q. How do you know that the Hudson Metal Products Company paid the munition tax on the manufacturing of munitions that they performed?

A. How do I know that they did? Just what do you mean?

Q. Are you an officer of that company?

A. No, but I have seen the canceled checks for the munition tax, which canceled checks were endorsed by the Internal Revenue Collector for the 2nd District of New York.

Q. How do you know that those checks were in payment of the munition tax?

A. I identified them with the munitions returns. We have copies of those returns in the office.

Q. Who do the manufacturing that you speak of?

A. The manufacturing was done for us (Hudson Metal Products Company) by the American Brake Shoe & Foundry Company, sub-contractors.

Redirect examination.

By Mr. Gordon:

Q. Did the American Brake Shoe & Foundry Company pay a munitions tax on the profit that they made?

A. Yes, sir.

159 Cross-examination.

By Mr. McGinnis:

Q. Did the Brake Shoe & Foundry Company sell these munitions?

A. They were reimbursed by the Hudson Metal Products Company for whatever outlays they made.

Q. But there were no sales made by them?

A. Well, unless you call that a sale; I would not call it a sale.

Signature of the witness waived by counsel.

I hereby certify that the foregoing is a correct transcript of my stenographic notes of the testimony given by the witness.

Witness my hand and official seal this 19th day of December, 1918.

[SEAL.]

CLARA I. HOUSTON,
Notary Public.

My commission expires January 22, 1921.

160 By Mr. Gordon: I also offer in evidence Article XII of the Regulation of Internal Revenue Department, published October 24, 1916. Treasury Decision No. 2384, which has been marked Plaintiff's Exhibit "O," which is as follows:

"Art. XIII. Any part thereof, as used in Section 301 of this Title is any article, relatively complete within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which without further treatment, cannot be used for any purpose other than that for which it was designed.

A stock or commercial commodity purchasable in the general trade or open market, if adapted to use in the manufacture of a munition is not a 'part' within the meaning of this Section, and will be treated as raw material provided that articles which ordinarily would be classed as commercial commodities become 'parts' within the meaning of this Title when they are manufactured specially for, and sold to a manufacturer to be, by him, incorporated in and made an essential part of any munitions enumerated in Section 301 of this Title."

"Art. XV. As used in Section 302 of this Title, and as applied to the manufacture of any part thereof (referring to the articles enumerated in paragraph- (b) to (e), inclusive, to Section 161 301), raw materials are held to be any crude or elemental products or substances necessary to the manufacture of such parts, and which, without the application of skill or science cannot become component parts of elements in the finished article or unit.

As applied to the manufacture of completed munitions, raw materials will include not only such crude products and elemental substances, but all essential finished or unfinished parts as well. The cost of raw materials authorized as a deduction will not include any expenditures made for raw materials used in the manufacture of articles other than munitions or parts thereof, in cases wherein the manufacture of such munitions or parts is carried on in connection with any other business. In other words, the only deduction to be made from the gross income contemplated by this Title on account of the cost of raw materials, is the cost of the articles, the profit on the sale or disposition of which is subject to the tax imposed by this Title."

By Mr. Gordon: The six pieces which have been identified here, which have been referred to by the witnesses, have been numbered from one to 6, inclusive, with the proper numbers attached to them, for the purpose of identification, No. 1, being the piece of solid round; No. 2 being the pierced forging in the shape in which it is sold by the plaintiff; No. 3 being the same forging cut in two longitudinally; No. 4 being a forging after the first rough machine process; No. 5 showing it after the nesting; and No. 6 being a segment of the completed shell body.

I also offer in evidence all the exhibits which have been identified and referred to in the trial of this case.

Plaintiff Rests.

By Mr. McGinnis: On behalf of defendant, I wish to move that a nonsuit be granted in this case, for the reason that the plaintiff under the law and the evidence has not established a cause of action.

By the Court: For the present I will overrule the motion for a nonsuit, and grant an exception to the defendant.

By Mr. McGinnis: I would like to offer in evidence what are known as Answers to Queries, put out by the office of the Commissioner of Internal Revenue, on this Munitions Act. It is simply a carbon copy, and is marked Defendant's Exhibit No. 4.

By Mr. Gordon: We have no objection.

By Mr. McGinnis: I also offer in evidence the several contracts which have been identified, being marked Defendant's Exhibits Nos. 1, 2 and 3.

Exhibits Nos. 1, 2 and 3 admitted.

Defendant Rests.

Testimony Closed.

Plaintiff submitted a point asking for binding instructions, and defendant submitted a point asking for binding instructions.

Recess.

164 *Oral Charge of the Court.*

THOMSON, J.

Gentlemen of the Jury:

This is an action by the Forged Steel Wheel Company, a corporation of the State of Pennsylvania, against C. G. Lewellyn, Collector of Internal Revenue for the 23rd District of Pennsylvania, to recover the sum of \$246,920.18, with interest from November 27th, 1917, being the amount of a certain tax levied and imposed upon the plaintiff on the net profits received by it in the year 1916, from the manufacture and sale of certain steel forgings used in the manufacture of shells. The said tax was imposed under Section 301 of the Act of Congress, approved September 8, 1916, entitled, "An Act to increase the revenue and for other purposes," on the ground that the plaintiff was engaged in the manufacture of munitions of war, and as such was liable under said Section for 12½ per cent of the net profits received from such manufacture and sale. The particular portion of said Section of the Act of Congress applicable to this case, provides, "Every person manufacturing (e) projectiles, shells or torpedoes of any kind, including shrapnel loaded or unloaded, or fuses or complete rounds of ammunition; (f) or any part of any of the articles mentioned, shall pay for each taxable year an excise tax of 12½ per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles of manufacture within the United States." The Section does not apply to the sale and delivery of such articles in the year 1916 under contracts executed and fully performed prior to January 1st, 1916.

Now, the plaintiff denied liability for the tax, and paid it under protest, and this action is brought to recover the amount of the tax so paid. It appears from the evidence, and I understand there is no controversy upon the evidence on this part of the case, that the plaintiff was and is a manufacturer of steel by the open-hearth process, from raw materials consisting largely, if not wholly of pig iron and scrap. The steel when in a molten state is cut into ingots, the ingots being reheated or rolled into billets or slabs. The billets are of different sizes and weights, to suit the size desired for the final rolled product. They are heated before rolling, and rolled into rounds, into flats, and other commercial shapes. The round bars, it appears, are about 11 feet long and about 6½ inches in diameter.

During the year 1916, certain persons engaged in the manufacture of projectiles, or parts of projectiles, in the United States, contracted with the plaintiff to furnish them certain steel forgings for shells.

In order to fill these contracts, these round bars were nicked and broken into proper lengths and put through two forging processes, and pressing operations. By the first process the steel rounds were pierced through the greater portion of their length, and by the second process they were elongated in a press by pressing or forcing them through three rings. Now, these steel rounds thus pierced and elongated, were then from $4\frac{1}{2}$ to $6\frac{1}{2}$ inches in diameter and 14 inches long, and were commonly known as rough forgings, and they were sold and delivered by the plaintiff under its several contracts. Many of these forgings so sold and delivered by 166 plaintiff, were manufactured from rounds or rolls which the plaintiff itself had manufactured. Some of them were made from steel rounds which it had purchased from other steel manufacturers, and in some instances the steel was purchased by the plaintiff and the forging done for it by others, and through these three methods the forgings were procured by the plaintiff and sold under its contracts. These rough forgings, it appears, weighed about 160 pounds, and in the subsequent operations by which they were made into a finished shell casing—not a finished shell—they were subjected, it appears, to about twenty-seven distinct processes. By these processes this rough forging underwent many and important changes in form, both internally and externally. There was a reduction in size to less than one-half of the original forgings. There was an addition of a base plate of another material, in order to strengthen the shell. Around the body was cut a groove into which was inserted a copper driving ring, and many delicate and intricate mechanical processes were had, before it became a perfected shell casing.

Now, these seem to be the undisputed facts, and it becomes a question largely of law for the Court to say whether under these uncontested facts the plaintiff was subject legally to the tax which it paid under compulsion.

Looking at the Act of Congress, and interpreting it according to the words which Congress used, and which Congress is supposed to have used in their ordinary and usual signification, it seems clear to the Court that this is a tax imposed upon profits which are made by a manufacturer of shells, or parts of shells, and which 167 completed shells or parts of shells the party or person sold or disposed of at a profit.

Now, it is perfectly plain under the testimony, that the plaintiff was not a manufacturer of shells, when we mean a completed instrument of death. This shell, under the testimony, evidently consists of several component parts, which are the results of manufacture from the raw material. The raw material, I would say, would be the elongated bar, which is a commercial product, sold to the trade and used for various purposes in the manufacturing and commercial works, and when that bar is cut into the requisite lengths for shell purposes and when pierced and elongated, it ceases to be a commercial product and is set aside and stamped indelibly as a portion of a shell on which the manufacturing process has been begun.

And it is also entirely clear to my mind that the forging is not

raw material, but it is a partial manufacture of the shell casing, upon which two or three very important mechanical processes have been had, and which were steps in the completion of the shell casing. But this was not a part of a shell within the meaning of this Act of Congress.

It was a piece of steel which was being manufactured into a steel casing, but it was not the steel casing. And as I understand this Act of Congress, since the plaintiff is not a manufacturer of shells, that is, the completed shell, a shell which has reached that stage of perfection that it is ready for use for the purpose for which it was intended, then there could be no tax levied upon the company unless it could be said that it was a manufacturer of a part of the shell. Now in your hearing there has been a very intelligent discussion of that question, and I agree with counsel for the 168 plaintiff that inasmuch as the completed shell has certain component parts, the casing, the base plate, the copper driving ring, the fuse, and perhaps other component parts, in addition to the explosive material by which it is fired, each one of these several parts enter into and constitute together the whole, and whoever is engaged in manufacturing one of these component parts, if he sells them for profit, is liable for this tax.

But, inasmuch as this plaintiff simply did certain forging work thereon, which constituted perhaps three out of thirty of the processes necessary to complete the shell casing, it could not be said in the eye of the law, that the company had manufactured a part of the shells.

This was a part manufacture, and not a manufacture of a part.

It appears that the plaintiff was assessed a certain tax, amounting to \$107,846.84, which, having a mistaken view of the law, it paid and is not seeking here to recover. In making its return it deducted the sum of \$3,184,048.56, being its estimate of the cost of raw materials entering into the manufacture of such forgings. Upon this basis the company assumed that a munition tax was owing to the amount of \$862,774.71, upon which a tax of \$107,846.84 was assessed and paid. But the officers of the United States Internal Revenue being dissatisfied with this return, made an examination of the books of the plaintiff company and directed that an additional return be made. This return showed as the cost of raw material entering into the manufacture of said articles, the sum of \$1,208,687.08, instead of the aforesaid sum of \$3,184,048.56, as first reported. This made a difference of \$1,975,331.47, which the 169 Federal government insisted and claimed constituted additional profits upon which a Federal tax of 12½ per cent should be paid, which amounted to the sum of \$246,920.18, being the amount which was paid under protest, and which amount is claimed by the plaintiff here.

Under all the evidence in the case, I instruct you to render a verdict in favor of the plaintiff for the sum of \$246,920.18, with interest from the 27th day of November, 1917, and the plaintiff's first point that, "Under the pleadings and evidence in this case, the verdict should be

in favor of the plaintiff and against the defendant for the full amount of the tax paid, to wit, \$246,920.18, with interest at the rate of six per cent per annum from the 27th day of November, 1917," is affirmed.

By Mr. McGinnis: Defendant takes exception to that portion of the charge of the Court affirming plaintiff's first point, and also takes exception to that portion of the charge of the Court directing a verdict in favor of the plaintiff.

Exception allowed and bill sealed in favor of the defendant.

I hereby certify that the foregoing is a correct transcript of the testimony, offers of counsel and rulings of the Court thereon, and the charge of the Court, in the case of Forged Steel Wheel Company vs. C. G. Lewellyn, etc., at No. 2016 November Term, 1918.

W. H. S. THOMSON,
Trial Judge.

I hereby certify that the foregoing is a correct transcript of the testimony given and the offers of counsel and the rulings of the Court thereon, together with the charge of the Court, in the case of Forged Steel Wheel Company vs. C. G. Lewellyn, etc., at No. 2016 November Term, 1918.

LUCY DORSEY IAMS,
Official Reporter,
By M. GANGWISCH.

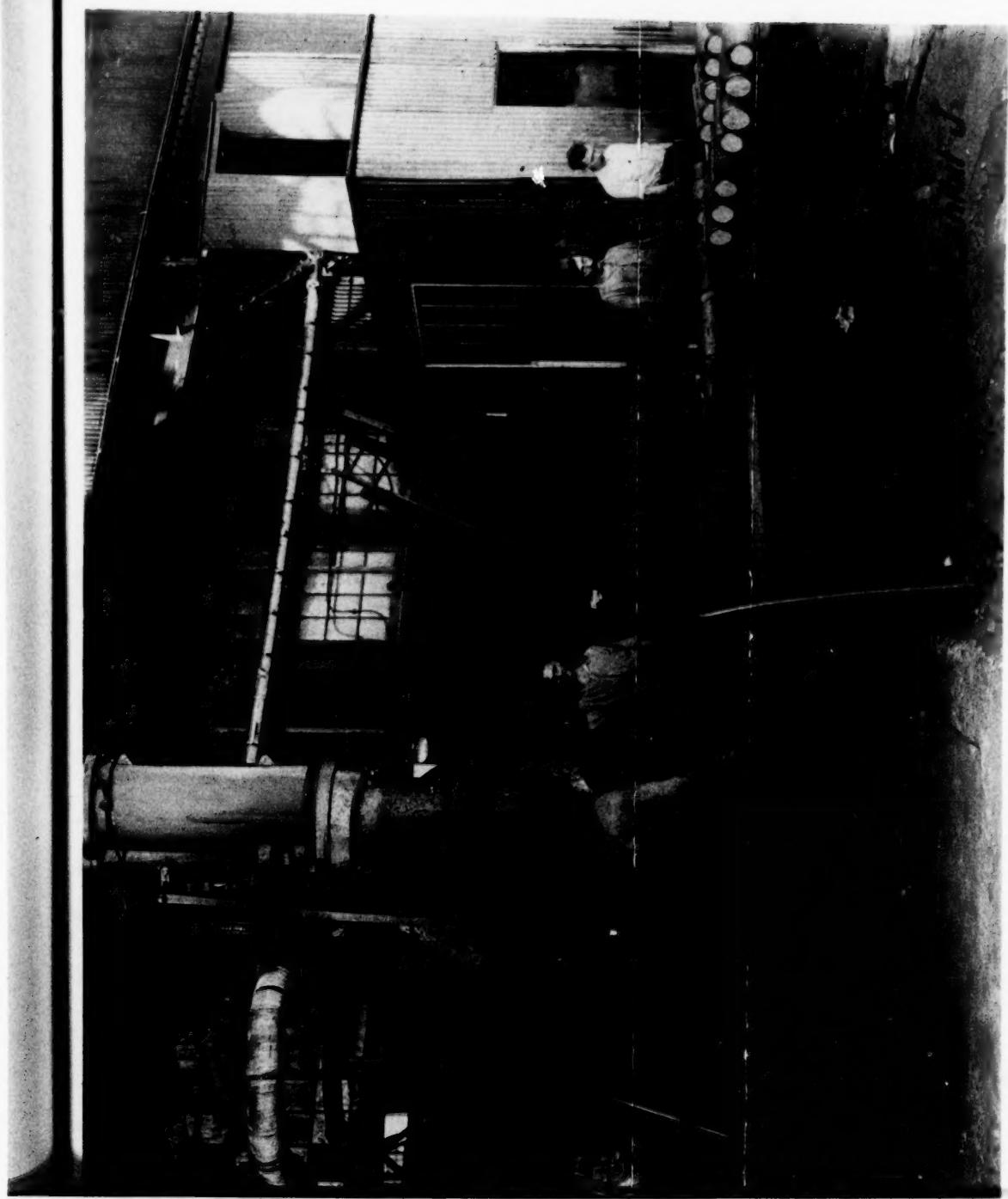
(Here follow photographs, etc., marked pages 170a to 170k inclusive.)

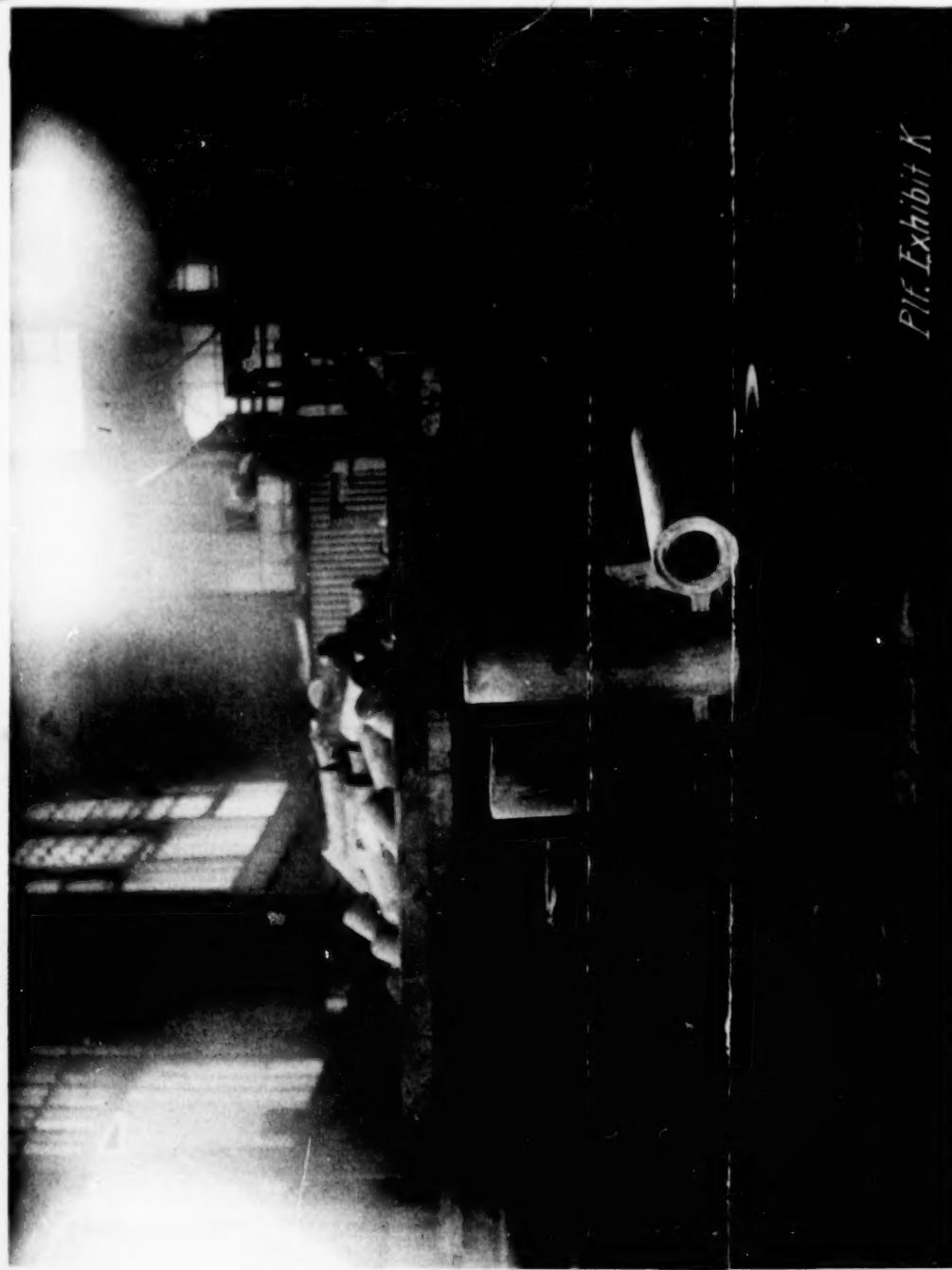
Plaintiff Exhibit H



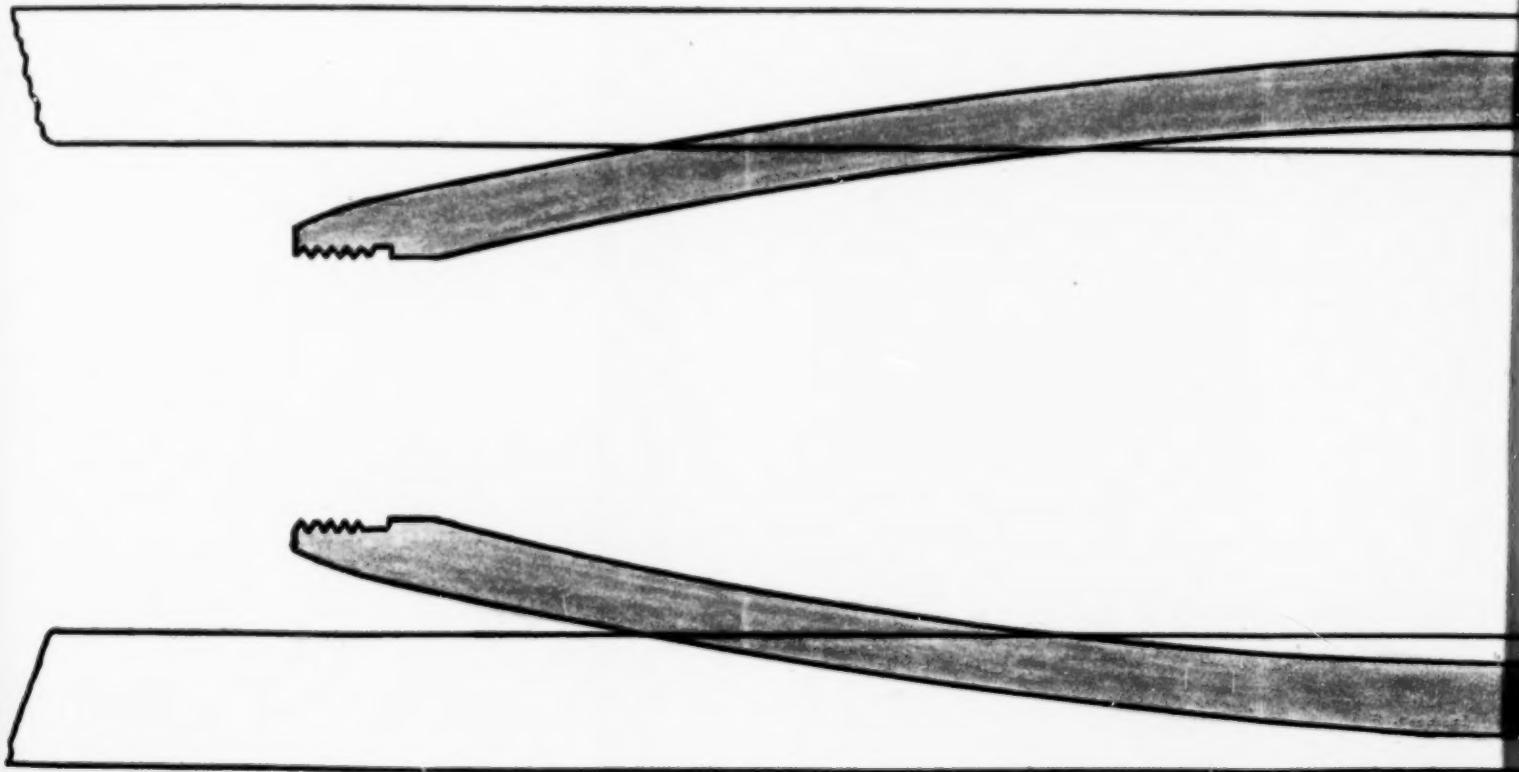
Plt. Exhibit I

J-CODE-1943.

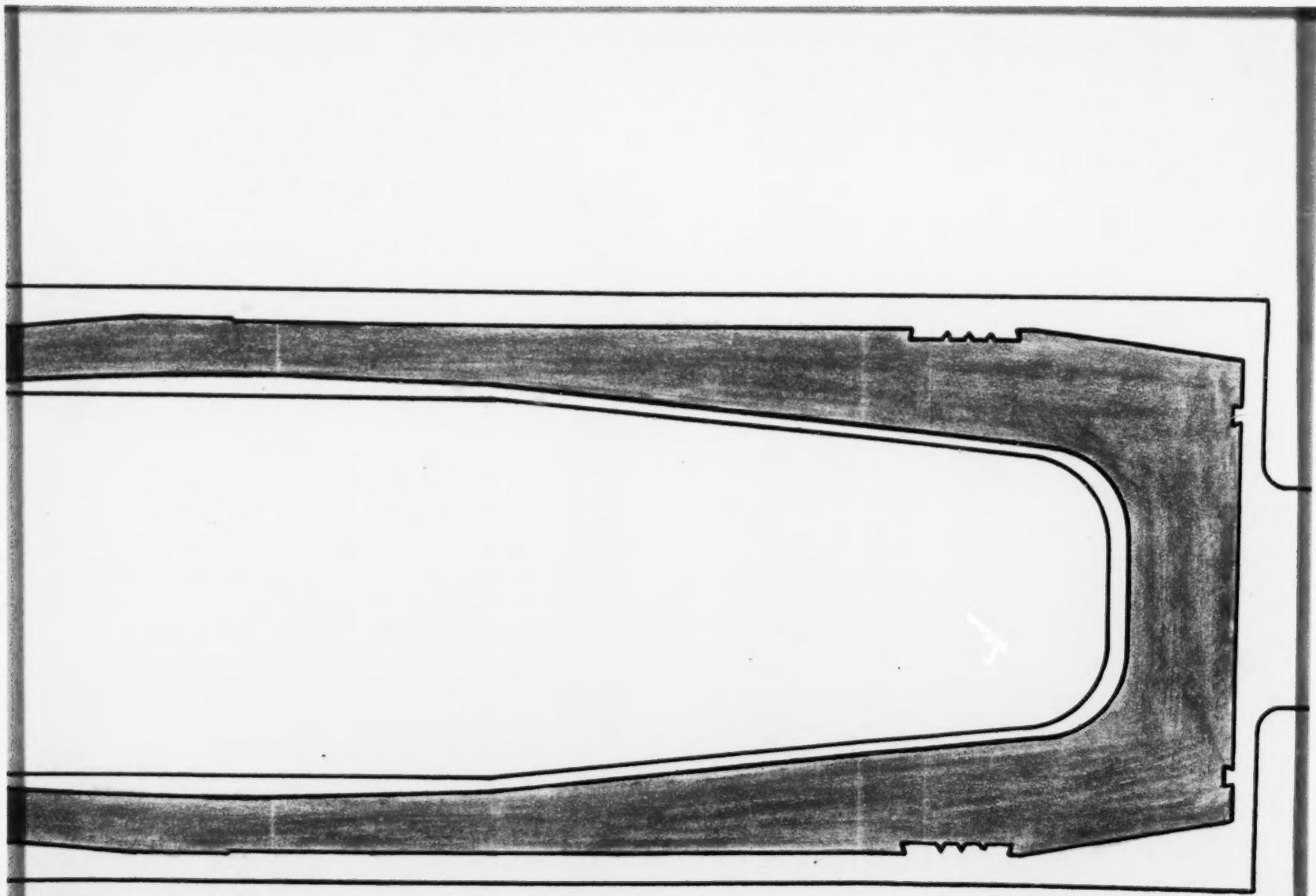




P/I/F. Exhibit K



Plaintiff's Exhibit

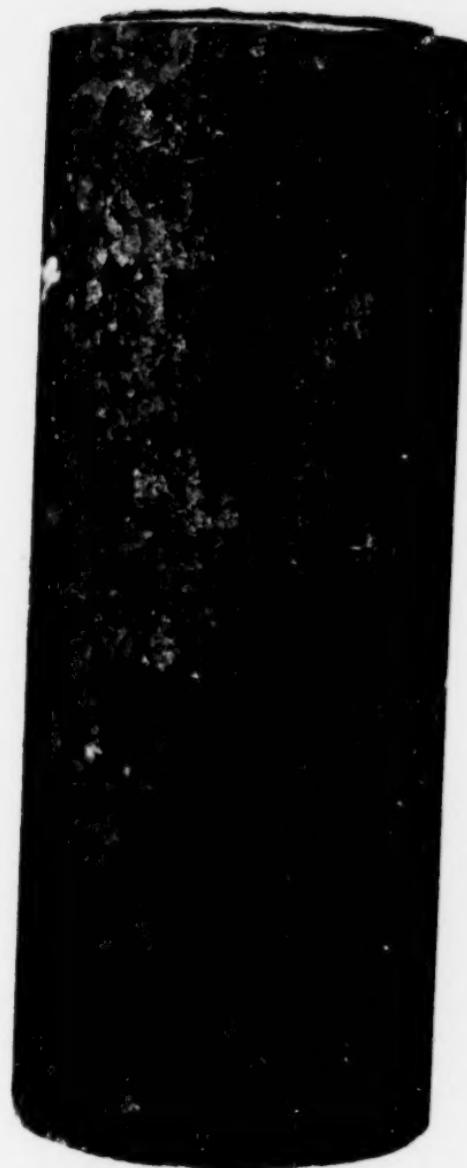


Plaintiff's Exhibit L.

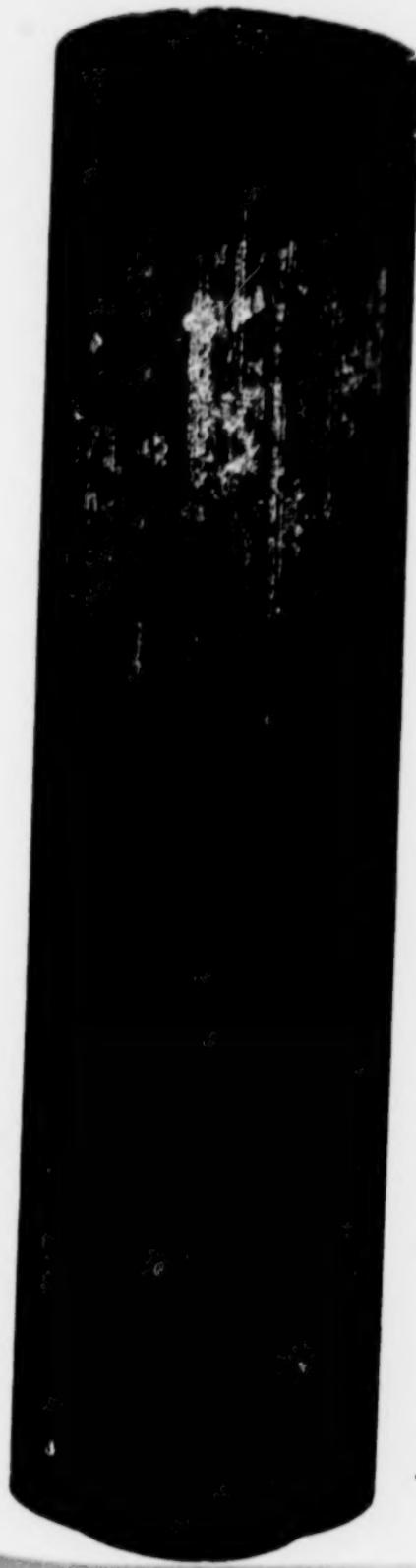




PLF. EXHIBIT
N-1







Plf. Exhibit N-2



PLF. EXHIBIT
N-3





PLF EXHIBIT
N-4





PLE. EXHIBIT
N-5



PLAINTIFF'S EXHIBIT "O."

Filed January 3, 1919.

Regulation No. 39 of International Revenue Department.

Published October 24, 1916.

T. D. 2384.

Art. XIII. "Any part thereof" as used in Section 301 of this Title is any article, relatively complete within itself, and designed or manufactured for the special purpose of being used as a component part of a completed munition, and which, by reason of some peculiar characteristic, loses its identity as a commercial commodity, and which, without further treatment, cannot be used for any purpose other than that for which it was designed.

A stock or commercial commodity purchasable in the general trade or open market if adapted to use in the manufacture of a munition is not a "part" within the meaning of this Section, and will be treated as raw material provided that articles which ordinarily would be classed as commercial commodities become "parts" within the meaning of this Title when they are manufactured specially for, and sold to a manufacturer to be by him, incorporated in and made an essential part of any munitions enumerated in Section 301 of this Title.

172 Art. XV. As used in Section 302 of this Title, and as applied to the manufacture of any part thereof (referring to the articles enumerated in paragraphs [b] to [e] inclusive of Section 301), raw materials are held to be any crude or elemental products or substances necessary to the manufacture of such parts, and which, without the application of skill or science cannot become component parts or elements in the finished article or unit.

As applied to the manufacture of completed munitions, raw materials will include not only such crude products and elemental substances, but all essential finished or unfinished parts as well. The cost of raw materials authorized as a deduction will not include any expenditures made for raw materials used in the manufacture of articles other than munitions or parts thereof, in cases wherein the manufacture of such munitions or parts is carried on in connection with any other business. In other words, the only deduction to be made from the gross income contemplated by this Title on account of the cost of raw materials, is the cost of such materials as are actually used in the manufacture of the articles, the profit on the sale or disposition of which is subject to the tax imposed by this Title.

173

DEFENDANT'S EXHIBIT No 1.

Received Auditor's Office Aug. 29, 1916, Butler, Pa.

Forged Steel Wheel Company.

General Office: Friek Building,

Pittsburgh, Pa.

August 28, 1916.

File 6-15.

Mr. J. H. Allman,
Manager of Works.Mr. T. H. Gillespie,
Auditor.Mr. A. Christianson,
Chief Engineer.Mr. A. N. Fay,
Purchasing Agent.

GENTLEMEN:

Regarding the 30,000 so-called 9.2" Rough forgings per our drawing PD-17-A, as called for by 5/0 5801, as well as the 50,000 so-called 9.2" Rough forgings per our drawing PD-45, as called for by 0/9 6822,—and with particular *referred* to required deliveries thereunder,—please note that I hand you hereto attached, copy of a letter-contract under date of August 15th, which we have executed

174 with Messrs. J. P. Morgan & Company, as agents for His Britannic Majesty's Government, and which I would thank you to very carefully note in connection with the deliveries of the forgings which we are called upon to make under the two office orders above referred to,—as this item of delivery is a most important one, and will seriously involve us unless our commitments are duly observed.

Yours very truly,

J. M. HANSEN,
President.

Mr. Gillespie:

Copy which is handed you hereto attached of the letter-contract above referred to, is the duplicate-original of same, for your information and records.

J. M. H.
B.

J. P. Morgan & Co.
Wall St. corner Broad.
New York
Drexel & Co.
Philadelphia.
Morgan, Grenfell & Co.
London.
Morgan, Harjes & Co.
Paris.

New York August 15, 1916.

Forged Steel Wheel Company,
170 Broadway,
New York City.

GENTLEMEN:

175 Referring to the contract between your Company and His Britannic Majesty's Government, known as B407-301W, as modified by the supplemental agreement dated June 12, 1916, we, as agents for His Britannic Majesty's Government, hereby extend the time of delivery of the 30,000 forgings covered by said contract to and including September 14, 1916, subject to the conditions below named, viz:

(1) That the Government will have the right, at its option, to cancel such number of the forgings covered by said contract as modified as you shall fail to have delivered, or to have completely manufactured and ready for final inspection, by September 14, 1916, said right of cancellation to be in addition and not in exclusion of any other rights or claims which the Government may have against you growing out of your failure to complete deliveries by September 14, 1916, of said 30,000 forgings. Except as modified by the foregoing, said contract, as amended by said supplemental agreement, shall remain in full force and effect.

(2) That deliveries under your contract with His Britannic Majesty's Government, dated June 30, 1916, and known as Contract B732-564W, shall be made as follows: 10,000 forgings during September; 13,000 during each of the months of October and November and 14,000 during the month of December, 1916, you agreeing to complete all deliveries under said contract by December 31, 1916. The rights of cancellation, as stated in the contract, shall apply to this revised schedule of deliveries and, except as modified in
176 the foregoing respects, said contract B-732-564W shall remain in full force and effect.

This extension shall become in force and effect only upon receipt at this office of a copy of this letter duly accepted by you.

Yours very truly,

HIS BRITANNIC MAJESTY'S
GOVERNMENT,
E. R. S.,
W. R.,
By J. P. MORGAN & CO.,
Agents.

Accepted:

FORGED STEEL WHEEL COMPANY,
By R. C. GORDON,
Asst. to President.

177 Received Aug. 21, 1916, Auditor's Office, Butler, Pa.

Forged Steel Wheel Company.

General Office: Frick Building,
Pittsburgh, Pa.

August 19, 1916.

File 6-15.

Mr. J. H. Allman,
Manager of Works.

Mr. T. H. Gillespie,
Auditor.

Mr. A. Christianson,
Chief Engineer.

Mr. A. N. Fay,
Purchasing Agent.

GENTLEMEN:

Attached hereto I hand you copy of a letter dated August 15th, 1916, from His Britannic Majesty's Government (Messrs. J. P. Morgan & Company, Agents), which relates to, and covers the, deliveries on which we are now called upon to make of the so-called 9.2" Rough Forgings under 0/0 5801, and also of the so-called 9.2" Rough Forgings (new style), as called for by 0/0 6822.

We have had considerable difficulty in re-arranging these delivery schedules, in the face of our repeated failures to live up to our promised deliveries, and it is most important, therefore, that we now arrange to duly observe the re-arranged schedules as 178 set forth in this letter of August 15th, above referred to,-- particularly in view of the fact that the lawyers for the Mor-

gan people seem to be so arranging matters that if we fail to make delivery of the full quantities covered by the orders, during the time specified, that they will not alone be in a position to force cancellations upon us, but, and more particularly, in a position to hold claims for damages against us.

Yours very truly,

J. M. HANSEN,
President.

Copy.

Referring to the contract between your Company and His Britannic Majesty's Government, known as B-407-301W, as modified by the supplemental agreement dated June 12, 1916, we, as agents for His Britannic Majesty's Government, hereby extend the time of delivery of the 30,000 forgings covered by said contract to and including September 14, 1916, subject to the conditions below named, viz:

(1) That the Government will have the right, at its option, to cancel such number of the forgings covered by said contract as modified as you shall fail to have delivered, or to have completely manufactured and ready for final inspection, by September 14th, 1916, said right of cancellation to be in addition and not in exclusion of any other rights or claims which the Government may have against you growing out of your failure to complete deliveries by September 14, 1916, of said 30,000 forgings. Except as modified by the forging said contract, as amended by said supplemental agreement, shall remain in full force and effect.

(2) That deliveries under your contract with His Britannic Majesty's Government, dated June 30, 1916, and known as Contract B732-564W, shall be made as follows: 10,000 forgings during September, 13,000 during each of the months of October and November and 14,000 during the month of December, 1916, you agreeing to complete all deliveries under said contract by December 31, 1916. The rights of cancellation, as stated in the contract, shall apply to this revised schedule of deliveries and, except as modified in the foregoing respects, said Contract B732-564W shall remain in full force and effect.

This extension shall become in force and effect only upon receipt at this office of a copy of this letter duly accepted by you.

180 Received June 23, 1916, Auditor's Office, Butler, Pa.

Forged Steel Wheel Company.

General Office: Frick Building,
Pittsburgh, Pa.

June 22nd, 1916.

File 6.

Mr. T. H. Gillespie,
Auditor.

DEAR SIR:

Supplementing notation on copy which I sent you, of my letter of June 2nd to Mr. J. H. Allman, Manager of Works, relative to the 30,000 so-called 9.2" Rough Forgings, as called for by Office Order No. 5801—and this letter and my notation to you specifically referring to changes in time of delivery, price, etc.—please note that I herewith hand you duplicate copy of Supplemental Agreement, dated June 12th, 1916, with Messrs. J. P. Morgan & Company, Agents for His Britannic Majesty's Government, which covers this transaction, this for your information and records.

It would seem as though there is nothing in this Supplemental Agreement which has not already been duly covered, and I would thank you to specifically advise me if you find the reverse to be the case in any detail.

Yours very truly,

J. M. HENSON,
President.

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Supplemental Agreement.

Dated the 12th day of June, 1916, between His Britannic Majesty's Government (hereinafter called the "Buyer") and Forged Steel Wheel Company, a corporation of the State of Pennsylvania, with an office at No. 170 Broadway, New York City, New York (hereinafter called the "Seller").

Whereas, a contract, dated September 30, 1915, and known as Contract B407-301W, was entered into between the Buyer and Seller covering the purchase and sale of Thirty thousand (30,000) forgings for 9.2-inch Howitzer high explosive shells, Mark II [L], to be delivered by the Seller in certain weekly instalments specified in said contract, all deliveries to be completed by January 31, 1916; and

Whereas, the Seller failed to complete deliveries of said Thirty thousand (30,000) forgings by January 31, 1916 (deliveries of some of said forgings having been made by the Seller up to the present time), and the Buyer has consented to an extension of the time for completion of deliveries of the forgings covered by said

contract until August 15, 1916, upon the terms and conditions herein contained;

Now Therefore, This Agreement Witnesseth, that in consideration of the premises and the mutual promises herein contained, the parties hereto have agreed and do agree as follows:

A. Said Contract B407-301W is hereby modified and amended in the manner below set forth:

182 (1) The time for the completion of deliveries of the now undelivered portion of the Thirty thousand (30,000) forgings for 9.2-inch Howitzer high explosive shells covered by said contract is hereby extended until August 15, 1916, upon the terms and conditions contained in this supplemental agreement, the Seller hereby agreeing that the delivery of said now undelivered forgings shall be completed by August 15, 1916. It is understood and agreed, however, that the Seller will use its best endeavors to complete said deliveries at the earliest possible date prior to August 15, 1916.

Within ten (10) days after the execution of this agreement, the Seller shall furnish to the Buyer a schedule of the monthly deliveries which the Seller proposes to make of the now undelivered portion of the Thirty thousand (30,000) forgings for 9.2-inch Howitzer high explosive shells covered by said contract.

(2) The price of the Thirty thousand (30,000) forgings covered by said Contract B407-301W, specified in said contract, is hereby revised as follows:

(a) The price of the first Fifteen thousand (15,000) forgings delivered by the Seller and accepted by the Buyer under said contract shall be Thirty dollars (\$30.00) for each such forging.

(b) The price of the second Fifteen thousand (15,000) forgings delivered by the Seller and accepted by the Buyer under said contract shall be Twenty-three dollars (\$23.00) for each such 183 forging which the Seller completely manufactures and tenders for final inspection on or before August 15, 1916.

(3) In lieu of the rights of cancellation of late deliveries specified in said Contract B407-301W the Buyer at its option may refuse to accept and pay for any of the Thirty thousand (30,000) forgings for 9.2-inch Howitzer high explosive shells purchased by the Buyer under said Contract B407-301W which the Seller shall fail for any cause whatsoever to have delivered, or to have completely manufactured and ready for final inspection, by August 15, 1916, this right of cancellation to be in addition to and not in exclusion of any other rights or claims which the Buyer may have against the Seller growing out of the Seller's failure to complete deliveries by August 15, 1916, of said Thirty thousand (30,000) forgings.

(4) The Seller shall be permitted to ship the forgings now undelivered under said contract without boxing, it being understood,

however, that such forgings shall be marked by the Seller in such manner as the Buyer or its representatives may direct.

B. Except as hereinabove expressly modified said Contract B407-301W shall be deemed to be in full force and effect, it being distinctly understood that the Seller shall not be entitled to deliver under said contract B407-301W (including all deliveries thereunder to date) and under this supplemental agreement an aggregate quantity of forgings for 9.2-inch Howitzer high explosive shells greater than the Thirty thousand (30,000) forgings originally purchased by the Buyer under said Contract B407-301W.

This Supplemental Agreement is executed in duplicate as of the day and year first above written.

HIS BRITANNIC MAJESTY'S GOVERNMENT,

E. R. S.,

W. I. C.

By J. P. MORGAN & CO.,

Agent.

FORGED STEEL WHEEL COMPANY,

By J. M. HANSON,

President.

Attest:

WM. BIERMAN,

Secretary. [SEAL.]

185

Forged Steel Wheel Company.

Works: Butler, Pa.

General Office: Frick Building.

Pittsburgh, Pa., October 12th, 1915.

File 720.

Mr. J. H. Allman,
Manager of Works.

Mr. T. H. Gillespie,
Auditor.

Mr. A. Christianson,
Chief Engineer.

Mr. A. N. Fay,
Purchasing Agent.

Standard Steel Car Company,
Building.

GENTLEMEN:

Referring to my General Letters of September 18th, 20th and 29th, relative to "Rough Forgings" and "Blocks of Steel,"—and

with particular reference to Office Order No. 5801, C. O./C/5295—
please note that I hand you, hereto attached, copy of the Contract
with His Britannic Majesty's Government, J. P. Morgan & Company,
Agents, dated September 30th, 1915, which covers this 30,000
186 of the so-called 9.2" Rough Forgings,—for your information
and records.

Very truly yours,

J. M. HANSEN,
President.

Mr. Gillespie:

The "copy" which is herewith handed you is the Duplicate—Original of the Contract referred to,—for due record and filing.

J. M. H.

Agreement.

Dated the 30th day of September, 1915, between his Britannic Majesty's Government (hereinafter called the "Buyer") and Forged Steel Wheel Company, a corporation of the State of Pennsylvania, *which* an office at No. 170 Broadway, New York City, New York (hereinafter called the "Seller"). Witnesseth:

That the parties hereto have agreed and do agree as follows: That the Buyer has contracted to purchase from the Seller and the Seller has contracted to sell to the Buyer, at the price and upon and subject to the terms and conditions following, viz:

Article.

Forgings for B. L., high explosive, 9.2-inch Howitzer shells, Mark II [L].

Specifications.

Said forgings shall be suitable for the manufacture therefrom of B. L., high explosive, 9.2-inch Howitzer shells, Mark II L, in conformity with British War Office General Specification No. 3471 C and Particular Specification No. 3352 B and Royal Laboratory Drawing No. 22283 (1), date August 19, 1915, which specifications and drawings are attached hereto and hereby made a part hereof so far as they may be applicable to the manufacture of said forgings.

Quantity.

Thirty thousand (30,000) such forgings.

Price.

Thirty dollars (\$30.00) for each such forging.

Packages.

The forgings shall be packed for export by the Seller, without cost to the Buyer, in accordance with the directions of the Buyer, and in a manner which shall reasonably assure the transportation of the forgings undamaged to point of destination. The packages in which the forgings are shipped shall become the property of the Buyer.

Time of Delivery.

The Seller agrees to make deliveries of said forgings hereunder as follows: Beginning eight (8) weeks from the date hereof, at 188 least three thousand five hundred (3,500) said forgings per week thereafter until all of said thirty thousand (30,000) forgings shall have been delivered, it being understood and agreed that delivery of all of said forgings shall be completed not later than seventeen (17) weeks from the date hereof.

Time is of the essence of this agreement, and in the event of the Seller's failure to have delivered, or to have manufactured, complete and ready for final inspection, seventeen thousand five hundred (17,500) forgings within thirteen (13) weeks from the date hereof (said number of forgings being the quantity required by the above schedule to be delivered during the first five (5) weeks of the deliveries above specified), the Buyer at its option may refuse to accept and pay for such part of said seventeen thousand five hundred (17,500) forgings as the Seller shall fail to have delivered, or to have manufactured, complete and ready for final inspection, at the end of such thirteen (13) weeks' period. The exercise of such right of cancellation by the Buyer shall not affect the respective obligations of the Seller and of the Buyer hereunder to deliver and receive subsequent instalments of forgings.

In the event of the Seller's failure to have delivered or to have manufactured, complete and ready for final inspection, the entire quantity of forgings hereby contracted for (less such cancellations as may have been made under the foregoing provision) within seventeen (17) weeks from the date hereof, the Buyer at its option may refuse to accept and pay for the forgings which the Seller so fails to have delivered, or to have manufactured, complete and ready for final inspection, at the end of such (17) weeks' period.

189 The Seller shall have the right to anticipate the weekly deliveries above specified. Deliveries made by the Seller in

advance of the dates or in excess of the quantities named in the above schedule may be credited upon subsequent deliveries.

Mode of Delivery.

All forgings hereby contracted for shall be delivered by the Seller free alongside ocean steamer, New York Harbor.

Terms of Payment.

The entire purchase price of any particular lot of said forgings shall be paid by the Buyer to the Seller within ten (10) days after presentation to the Buyer at the offices of Messrs. J. P. Morgan & Co., 23 Wall Street, New York City, of proper invoices and shipping documents showing delivery of such lot of forgings free alongside ocean steamer, New York Harbor, accompanied by proper certificates of inspection and acceptance with respect thereto, executed by an inspector of the Buyer after satisfactory completion of all tests of such forgings.

Inspection.

It is understood and agreed that the Buyer shall have the right of having one or more inspectors at each of the factories where the forgings hereby contracted for are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivery, and that the Seller, or its 190 sub-contractors, shall furnish all facilities required by such inspectors for this purpose. The Seller, at its expense, shall furnish all gauges to be used in connection with the manufacture of the forgings hereby contracted for, including master gauges and all gauges required by the inspectors of the Buyer.

All forgings hereby contracted for are subject to factory inspection and shop test at the works of the Seller to determine their compliance with the requirements of this agreement, and to acceptance by an inspector of the Buyer after satisfactory completion of such tests.

Storage.

Upon written notice from the Buyer of its inability to provide oversea transportation, the Seller agrees to store, at its expense, but at the Buyer's risk, for a period of thirty (30) days all forgings contracted for hereunder which have been finally inspected by an inspector of the Buyer and are ready for delivery hereunder. Forgings so stored shall be deemed delivered when so stored, and shall be paid for accordingly within ten (10) days after presentation to the Buyer, as aforesaid, of proper invoices and certificates of inspection and acceptance with respect thereto. Such payment, how-

ever, shall not be construed as a waiver of the obligation of the Seller to deliver the forgings, so stored, free alongside ocean steamer, New York Harbor.

Conditions.

It is understood and agreed that if by reason of an embargo the forgings hereby contracted for cannot be exported from the 191 United States, or in the event of the cessation of hostilities or the termination of the war before the delivery of the forgings hereby contracted for has been completed, the Buyer at its option may terminate this agreement, but in such event the Seller shall be entitled to receive the unpaid purchase price of any forgings then actually manufactured and complying with the requirements of this agreement, and in addition thereto a sum sufficient to cover the actual net expenditures and outstanding obligations of the Seller made with respect to the portion of the order the delivery of which is so cancelled.

Contingencies.

The obligations of the Seller hereunder are subject to strikes, fires, floods, acts of God or other causes beyond its control preventing performance thereof. This provision, however, shall not be construed to modify or limit the right hereinabove given to the Buyer to refuse to accept and pay for forgings not delivered, or manufactured, complete and ready for final inspection, at the end of said thirteen (13) and seventeen (17) weeks' period, respectively, as above provided in the paragraph entitled "Time of Delivery."

Option for Further Purchases.

The Buyer shall have the option, to be exercised by the Buyer not later than twelve (12) weeks from the date hereof, to purchase from the Seller hereunder an additional ninety-one thousand (91,000) such forgings or any part thereof not less than fourteen thousand (14,000) forgings, such additional forgings to be 192 delivered by the Seller, at the rate of at least three thousand five hundred (3,500) forgings per week immediately after the completion of the deliveries of the thirty thousand (30,000) forgings hereby contracted for. The purchase of any such additional forgings shall be subject to all the terms and conditions herein contained, except that the above named price is subject to such modification thereof as may be necessary in order to cover advances or declines in the then prevailing cost of raw materials and labor.

This Agreement is executed in duplicate as of the day and year, first above written.

HIS BRITANNIC MAJESTY'S GOVERNMENT,

E. R. S.,

W. O. C.,

By J. P. MORGAN & CO.,

Agents.

FORGED STEEL WHEEL COMPANY,

By J. M. HANSON,

President.

Attest:

WM. BIERMAN,

Secretary. [SEAL.]

193 "At the issuing date these plans or specifications are sufficiently accurate for general preparatory work, but as experience may necessitate certain alterations, care should be taken to have the particulars verified by this Department before important tools are ordered or actual manufacturing operations are commenced, when a specially endorsed drawing correct at the date of the contract will be issued to guide manufacture."

M. MacLeod for C. I. W.

L

23/8/15

3471C

This Specification, or any Patterns, Drawings, or other information issued in connection therewith, may only be used for a specific order, placed by an Officer of the War Department, and is not to be used for any other purpose whatsoever, without the express written sanction of the Army Council.

Shell, B. L. or Q. F., high explosive, forged steel (fitted with adapter).

General Specification to govern manufacture and inspection.

57

24

Approved, 22nd June, 1915.

1519

194 Note.—The following specification contains conditions which apply to all shells, B.L. or Q.F. high explosive, forged steel, fitted with adapters. A separate specification has been prepared with regard to each calibre of shell in which are laid down the particulars of the sealed drawing, dimensions and proof.

The general specification is to be read with the particular specification for the calibre of shell ordered.

1. Dimensions.—The general dimensions of the shells are to be in conformity with the drawing. Should any discrepancy be found to exist between the drawing and this specification, reference is to be made to the Chief Inspector, Royal Arsenal, Woolwich.

2. Quality of Material.—The shell is to be of forged steel of the best quality, homogeneous throughout and free from seams, flaws and piping. It must be manufactured:—

(a) In the case of shells for guns above 6 inches in calibre, by the "acid open-hearth," "electric furnace" or "stock-converter" process.

(b) In the case of shells for guns of 6 inches calibre and below, and for all howitzers, by the "acid or basic open-hearth," "electric furnace," or "stock-converter" process.

If made by the "stock-converter" process, non-phosphoric pig iron must be used.

195 The composition of the steel will be determined by analysis. Apart from the iron, the following chemical elements may occur in the percentages shown in the Table, viz.:

	Min.	Max.
Carbon	—	0.55 per cent.
Nickel	—	0.5 "
Silicon	—	0.3 "
Manganese	0.4	1.0 "
Sulphur	—	0.05 "
Phosphorus	—	0.05 "
Copper	—	0.1 "

The Contractor will take no steps to introduce into the composition of the steel any special ingredient (e. g., chromium, aluminium) without information being given previously to the Inspecting Officer.

Should the Contractor, in making tests for his own information, find that any sample contains constituents additional to those named in the Table, he is to call the attention of the Inspecting Officer thereto.

3. Inspection of Ingots and Billets.—The ingots for shells and adapters must be top-poured and will be submitted to the Chief Inspector, Woolwich, or an Officer deputed by him, at the Contractor's works, who will make the necessary arrangements to have 20 per cent. cut off the top end of each ingot, and such further portion as may be necessary to ensure complete removal of the piping.

If it is desired to use bottom-poured ingots, the written permission of the Chief Inspector, Woolwich, must be obtained, and in this case the discard will be 25 per cent, a portion thereof being 196 taken from the bottom of the ingot. The proportion taken from the bottom to be left to the discretion of the Inspector.

The portion to be cut off is to be removed by sawing and breaking after the ingot, or partially forged ingot, has cooled down, and such parting, in the case of a partial forging of an ingot, should be ef-

fected through a section of the ingot which has not been forged. Contractors who have not the necessary plant for cutting the discard from the ingot cold will be allowed to roll or forge the ingot to billet size before removal of the discard. The area of the fractured part will be 1/6th of the section area of the ingot if only one shell is to be made from it, and 1/12th if more than one shell is to be made from it.

If only one shell is to be made from an ingot, the latter, after removal of the discard, will be inspected and stamped in such manner as will ensure the base of the shell being towards the bottom of the ingot.

Such marking as may be necessary to identify the steel makers' cast and ingot numbers will be maintained by the Contractor upon every shell and adapter throughout manufacture. Where hollow-forged shell are submitted for test by day's work of drawing, the date of drawing must be similarly maintained.

The adapters are to be so forged that the longitudinal axis of the adapter is at right angles to the longitudinal axis of the original ingot, and they are to be stamped in such a way as to ensure this.

4. Treatment.—No hardening, toughening in oil, or process of a like nature is permitted.

197 5 Tests.—Mechanical tests will be taken as follows:—

(a) Longitudinal tensile and compression tests cut from the walls of at least 1 per cent. of the shells of every cast. Where hollow-forged, shell may be submitted in batches containing all the shell of any one day's work of drawing.

(b) The Contractor should so mark the adapters that the original direction of forging or rolling may be recognized, and the axes of the test pieces may, if the Contractor so desires, be placed parallel to it.

Tests will be taken from 1 per cent. of the adapters of every cast after final forging, tangential to the bottom of the cavity or cut from a disc at the outer end of the adapter at the option of the Contractor.

The must be capable of standing the following tests:—

198

Ten sile.

Tenacity, tons per square inch.

Yield (Minimum).	Breaking. (Minimum).
Shells	19
Adapters	19

Elongation in a 2" test piece, or such piece as can be cut from the shell or adapter provided that $\frac{\text{length}}{\text{width}} = 4$.
 (Minimum).
 17 per cent.
 17 "

199

Compression.

A cylinder, of length equal to diameter, will be cold compressed to half its original length, and must stand this test without cracking.

If any one or more of the conditions in this clause be not complied with, the cast or batch of shells affected will be rejected and must not be submitted without permission.

Class "C" Metal.

The Contractor will supply free of charge, the necessary metal for testing, if requested by the Chief Inspector, Woolwich, to do so. The pieces should not be less than 7 inches in length, nor less than 1 inch in diameter.

Test pieces prepared from the above will be required to stand the following minimum tests.

Tensile.

Tensile. Yield.	Tenacity, tons per square inch.	Breaking.	Elongation in a 2" test such a test piece as can be cut from the metal, length provided that $\frac{\text{length}}{\sqrt{\text{area}}}$ = 4. 10 per cent.
6	12		

This metal must not contain more than 0.1 per cent. of lead. Samples may be taken from the nose-bushes of the finished shell for testing and analysis, and must be replaced at the Contractor's expense.

200 The metal may contain up to 1 per cent. of lead, subject to the following conditions:—

- (1) The present mechanical tests of the Specifications are to be adhered to.
- (2) The surface of the nose-bush where it is liable to come in contact with the explosive is to be well nickel-plated or tinned with pure tin.
- (3) The pure tin or nickel used for coating must not contain more than 0.1 per cent. of lead, and the coating is to be continuous and satisfactory as regards adhesion, in the opinion of the Inspector.

6. Construction.—The head of the shell is to be struck with the radius shown on the drawing, the point being truncated and screwed to receive the nose-bush or fuze. No sharp edge is to remain at the cavity end of the fuze hole threads, which should be chamfered if necessary.

The shells and adapters are to be turned and finished to the form and dimensions shown on the drawing.

The base of the shell will be screwed internally, as shown on the drawing. The adapter will be screwed externally, as shown on the drawing; the threads are to be a tight fit with those on the shell, and there must be no appreciable shake between the adapter and the shell when the former is screwed half-way home.

A groove for the driving band is to be turned near the base and undercut, with the number of waved ribs shown on the drawing projecting on the bottom to prevent the driving band from turning on the shell.

201 Three chisel cuts may be made across the waved ribs in the groove for the driving band at an angle to the longitudinal axis of the projectile, to allow the air in the channels between the ribs to escape when the band is being pressed on.

In the case of cup-shaped adapters the upper edge of the adapter must not project into the shell cavity at any point on its circumference.

7. Nose-Bush.—If a nose-bush is shown on the drawing, it may be of mild steel or Class "C" metal; or it may be omitted and the fuze-hold formed in the head of the shell, if there is a note on the drawing to that effect. The bushes, after having been machined to shape on the nose, and also internally, will be unscrewed about a quarter of an inch, so as to be readily removable for examination on delivery. Roughness and sharp edges should be removed from the cavity at the junction of the shell with nose-bush. A steel fixing screw will be fitted in the bush or head of the shell, as shown on the drawing.

8. The limits (high and low) allowed are shown on the drawing.

9. Driving Band.—The driving band is to be made from a ring of drawn or electro-deposited copper which must not contain more than .004 per cent. bismuth and .01 per cent. antimony, and is to be pressed into and in contact with the bottom and undercut of the groove in the shell all around and accurately turned to the form shown on the drawing.

202 10. Screw Threads.—All screw threads must, unless otherwise stated herein, or on the drawing, be of the British standard fine screw thread, and conform to the standard gauges of the Chief Inspector, Woolwich. Contractors may send their screw gauges at any time to the Chief Inspector, Woolwich, to be checked and compared with the standard gauges.

11. Preliminary Examination.—The shells, after they have been prepared to receive the adapters, grooved and finish machined internally and externally, but before varnishing or banding, will be submitted for preliminary examination.

The adapters must be submitted separately, finished except as to their outer face.

Any shell or adapter which is not finished to the satisfaction of

the Inspecting Officer or which has any flaw or imperfection, or which fails to pass the Inspecting Officer's gauges, will be rejected.

12. Varnishing.—While the shells are clean and free from scale or rust they are to be thoroughly coated internally with copal varnish and stowed at 300 degrees F for 8 hours.

The Contractor must supply for analysis a sample of the liquid varnish used. Further samples will be scraped out from the shells, which must be revarnished by the Contractor free of charge.

This varnish must be free from metallic impurity in any form, the following only being permitted:—

- (a) A per centage of manganese not exceeding 0.5.
- (b) A percentage of lead calculated as Pb taken from scrapings not exceeding 0.05.
- (c) A percentage of copper not exceeding 0.1.

203 It must adhere firmly and present a perfectly smooth, clean, and dry surface, free from cracks, flaws, impurities, and other imperfections. Any shell supplied with the steel surface under the varnish not clean, free from rust, scale and foreign matter, or in which the varnish does not adhere firmly, will be rejected. After varnishing there must be no recess at the junction of the shell and adapter.

13. Marking.—The shell will be stamped on the base with the calibre, numeral, Contractor's initials, and date of completion of manufacture as shown on the drawing. Numbers to identify the cast and ingot of the shell are to be stamped on the head and numbers to identify the cast and ingot of the adapter on the base.

14. Delivery.—(a) The shells will be covered with a thin coating of vaseline or other similar anti-corrosive grease, which must be of such nature as not to interfere with gauging, and they will then be delivered, unpainted, at the Royal Arsenal, Woolwich, for inspection and proof.

(b) The shells will be delivered in lots for purposes of proof. A lot for this purpose will consist, as far as possible, of shells governed by the same mechanical tests under Clause 5 (a), and must not contain more than 121 shells. When the number so governed is less than 100, a number of casts or batches, up to a maximum of 7, may be grouped together for this purpose. In the event of further proof being required she shell will be taken from the lot supplied.

204 (c) The Contractor will supply, free of charge, such shells and adapters as may be required as described in Clauses 5 and 16 and such driving bands as in Clauses 15c and 16. The shells expended in proof, whether fired or otherwise tested, will be the property of the Government.

15. Main examination after delivery.—(a) Any shell of a lot which fails to pass the Inspecting Officer's gauges, or fails to satisfy the Chief Inspector, Woolwich, of its serviceability, will be rejected.

(b) If at any time during the examination it is found that defects of any nature other than errors of machining, which involve rejection of the defective shell amount to 5 per cent. of the number of the shells in the lot, the lot will be rejected.

(c) The driving band may, at the option of the Chief Inspector, Woolwich, be cut off one or more shells selected from the lot. Should the driving band appear not to have been thoroughly pressed home into the groove and undercut throughout, or should it fail to comply with the requirements of Clause 9 as to purity the lot will be rejected.

It will also be tested by being doubled and hammered flat upon itself. Should it crack or break under this test, the lot will be rejected.

(d) If at any time during the examination of a lot it is found that 5 per cent. of the shells in the lot depart from the approved design, further examination of the lot will be suspended.

The whole of the lot must be re-examined by the firm, and those shells which are incorrect to design eliminated.

205 Those shells in which the departure can be rectified may be brought to the approved design by the firm. The lot may then be re-submitted for examination.

16. Proof.—A percentage of the shells, filled with sand or other suitable material, will be fired for recovery from a B. L. or Q. F. gun. Particulars of the gun pressure will be found in the separate specification for the particular calibre ordered. Should the shells so fired set up or break up in the gun, or should any portion of the driving band separate from the shell before the first graze or impact, or should the adapter be distorted or fail to function correctly, the lot will be rejected, provided always that the pressure did not exceed the specification proof pressure by 0.5 ton. If the pressure did exceed this limit, a second proof is to be taken at Government expenses before the lot is rejected. The pressure of the round, if not taken, will be assumed to be that of the last round fired with the same charge in which pressure was taken.

Further, should the shell be reported unsteady in flight and be found, on recovery, to be without its driving band, or with the driving band loose or slipped in its seating, then the driving band of a similar number of shells to that taken for firing proof may be cut out to ascertain whether they have been properly pressed down; if they have not been pressed down to the satisfaction of the Chief Inspector, Woolwich, the lot will be rejected. If found correct, such shells will be rebanded by the Contractor free of charge.

17. Resubmission.—(a) A lot rejected under either Clauses 15 or 16 must not be resubmitted unless the rejection is due to 206 failure of the driving band, or for rectifiable gauging defects.

(b) Shells put out at any period of inspection for remediable defects may be resubmitted for further examination after the defects have been rectified. It is to be understood that the examination of

such shells at that time will be incomplete, and that they are liable to rejection after rectification.

(c) If the Contractor wishes to reinvoice a lot rejected for failure of driving band under Clauses 15c or 16, he must remove the shells and reband them before they are again submitted.

(d) Rejected shells will, if considered necessary, be marked with a small rejection mark, so that they can be readily identified if redelivered.

18. Submission of Shell in Stock.—If the Contractor wishes to supply shell already made, or partly manufactured, at the date of Contract, he should request permission of the Chief Inspector, Woolwich, to submit them, and give such particulars as will enable the Inspecting Officer to see that the Specification has been complied with.

19. Plugs.—Plugs for the protection of fuze holes in transit will be supplied free of charge, on demand, by the Ordnance Officer to whom delivery is to be made.

20. Packing.—All packages are to be so marked that the goods contained therein may be readily identified with the invoice. Unless it is specified in the contract that the packing cases or other packing material are to become the property of the Government 207 they will remain the property of the Contractor, who is responsible for their removal. Should they not be removed within two months of the acceptance of the stores, they will be disposed of, and in such circumstances the Contractor will not be entitled to make any claim for compensation. The packing cases must be marked "Returnable" or "Non-returnable."

21. Inspection.—The shells may be inspected at any time during manufacture by, and will be subject to testing by, and to the final approval of, the Chief Inspector, Woolwich, or an Officer deputed by him.

H. GUTHRIE SMITH,
Director of Artillery.

War Office.

This Specification is to be returned to the Chief Inspector, Royal Arsenal, Woolwich, on completion of the ¹ tender. _{contract.}

L/3352-B.
(Supersedes L/2562).

This Specification, or any Patterns, Drawings, or other information issued in connection therewith, may only be used for a specific order, placed by an Officer of the War Department, and is not to be used for any other purpose whatsoever, without the express written sanction of the Army Council.

Shell B. L., high explosive 9.2 Howitzer, Mark II L; forged steel, with *facing* screw

208 *Specification of Particulars as to Sealed Drawing, Dimensions and Proof.*57
24
9935

Approved, 4th October, 1914.

NOTE.—This specification is to be read in conjunction with the general specification to govern the manufacture and inspection of Shell, B. L. or Q. F., high explosive forged steel, with adapters (L/3471).

1. The drawing mentioned in the general specifications is R. L. No. 22283 (1), full size.

2. Proof (vide general specification, clause 16).—The shell will be fired for recovery from a 9.2-inch B. L. Howitzer with such a charge as will give a chamber pressure not less than 13 tons per square inch.

H. GUTHRIE SMITH,
Director of Artillery.

War Office.

This Specification is to be returned to the Chief Inspector, Royal Arsenal, Woolwich, on completion of the {tender.
{contract.

209

DEFENDANT'S EXHIBIT NO. 2.

Received Sept. 30, 1915, Auditor's Office, Butler, Pa.

Forged Steel Wheel Company.

General Office: Frick Building,
Pittsburgh, Pa., Sept. 30th, 1915.

File 716.

Mr. J. H. Allman,
Manager of Works.
Mr. T. H. Gillespie,
Auditor.

Mr. A. Christianson,
Chief Engineer.

Mr. A. N. Fay,
Purchasing Agent.

GENTLEMEN:

Supplementing my General Letters of September 18th, and 20th, and 29th, relative to orders for "Blocks of Steel" and "Rough For-

ings, please note that, for your information and records, I herewith hand you copy of our Contract dated August 31st, 1915,
210 with the J. G. Brill Company, Philadelphia, Pa.—which governs and controls our Office Orders Nos. 5696 and 5697.

Yours very truly,

J. M. HANSEN,
President.

Mr. T. H. Gillespie,
Auditor:

The "copy" which is herewith handed you is the Duplicate-Original of the Contract referred to,—for your information and records.

J. M. H.
B.

Agreement

Dated the thirty-first day of August, 1915, between the J. B. Brill Company, a corporation of the State of Pennsylvania, with an office at Philadelphia, Pennsylvania (hereinafter called "Brill"), and Forged Steel Wheel Company, a corporation of the State of Pennsylvania, with its General Offices in the Frick Building, Pittsburgh, Pennsylvania (hereinafter called "Forged").

Witnesseth:

That the parties hereto have agreed and do agree as follows: That "Brill" has contracted to purchase from "Forged" and 211 "Forged" has contracted to sell to "Brill," at the prices and upon and subject to the terms and conditions following, viz:

Article.

Either so-called "Rough Forging for 6" Shell, Mark XVI (L)," as set forth on Forged Steel Wheel Company's Drawing No. PD-15-A, (hereinafter called "Rough Forgings"), or individual "Billet for 6" Forging, Mark XVI L," as set forth in double-form on Forged Steel Wheel Company's Drawing No. 2175 (hereinafter called "Blocks of Steel"),—one or the other, or both, as hereinafter specified and provided for.

It is understood and agreed that this Drawing No. 2175 shows the Steel-Billet as it is prepared in connection with two (2) of the "Blocks of Steel," and that the "Blocks of Steel," as herein referred to, are the individual pieces which are, as shown on the Drawing, 6½" in diameter and 15" maximum or 14⅔" minimum in length.

Specifications.

Said "Rough Forgings," or "Blocks of Steel," shall conform to all applicable provisions of British War Office General Specification No. L/3472-E and of Particular Specification No. L/3509, copies of which specifications, as well as blue-print copies of the Drawings

Nos. PD-15-A, and 2175, hereinabove referred to, are attached hereto and made a part hereof.

Quantity.

212 Either one hundred and forty-seven thousand (147,000) of the "Rough forgings," or one hundred and forty-seven thousand (147,000) of the "Blocks of Steel,"—or a certain number of the "Rough forgings" and a certain number of the "Blocks of Steel," which quantities of each are determinable and determined as hereinafter provided for, and which shall total one hundred and forty-seven thousand (147,000) units.

Price.

Six Dollars (\$6.00) for each one of the "Rough forgings," and Three Dollars and Eighty-five Cents (\$3.85) for each one of the "Blocks of Steel"—and which prices are free on board Railroad car at either Philadelphia, Pennsylvania, or Woodberry, Maryland.

Packages.

It is understood and agreed that "Forged" is not to be called upon to pack either the "Rough forgings," or the "Blocks of Steel" in any special manner—but that such "Rough forgings," or "Blocks of Steel," are simply to be loaded, loose, in Railroad cars in accordance with the dictates of ordinary commercial practice.

Time of Delivery.

"Forged" agrees to make shipments from its place, or places, of manufacture of an average of a total of three thousand (3,000) of the "Rough forgings" per week for and during the four (4) weeks commencing September 20th, September 27th, October 4th, and October 11th, 1915. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of a total of four thousand (4,000) of the "Rough forgings" per week for and during the four weeks commencing October 18th, October 25th, November 1st, and November 8th, 1915—unless however, "Brill" shall have notified "Forged," in writing, on or before September 20th, 1915, that "Blocks of Steel" are desired, instead of "Rough forgings," in which event "Forged" agreed to make shipments from its place, or places, of manufacture of an average of a total of four thousand (4,000) of the "Blocks of Steel" per week for and during the four (4) weeks commencing October 18th, October 25th, November 1st and November 8th, 1915, in lieu of the "Rough forgings" hereinbefore provided for shipment during that period. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of a total of five thousand (5,000) of the "Rough forgings" per week for and during the four (4) weeks commencing November 15th, November 22nd,

November 29th and December 6th, 1915—unless, however, "Brill" shall have notified "Forged," in writing, on or before October 18th, 1915, that "Blocks of Steel" are desired, instead of "Rough Forgings" in which event "Forged" agrees to make shipments from its place, or places, of manufacture of an average of a total of five thousand (5,000) of the "Blocks of Steel" per week for and during the four (4) weeks commencing November 15th, November 22nd, November 29th and December 6th, 1915, in lieu of the "Rough Forgings" hereinbefore provided for shipment during that period. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of six thousand (6,000) of the "Rough

Forgings" per week for and during the four (4) weeks
214 commencing December 13th, December 20th and December

27th, 1915 and January 3rd, 1916—unless, however, "Brill" shall have notified "Forged," in writing, on or before November 15th, 1915, that "Blocks of Steel" are desired, instead of "Rough Forgings," in which event "Forged" agrees to make shipments from its place, or places, of manufacture of an average of a total of six thousand (6,000) of the "Blocks of Steel" per week for and during the four (4) weeks commencing December 13th, December 20th and December 27th, 1915, and January 3rd, 1916, in lieu of the "Rough Forgings" hereinbefore provided for shipment during that period. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of seventy-five hundred (7500) of the "Rough Forgings" per week for and during the four (4) weeks commencing January 10th, January 17th, January 24th and January 31st, 1916—unless, however, "Brill" shall have notified "Forged," in writing, on or before December 13th, 1915, that "Blocks of Steel" are desired instead of "Rough Forgings," in which event "Forged" agrees to make shipment from its place, or places of manufacture of an average of a total of seventy-five hundred (7500) of the "Blocks of Steel" per week for and during the said four (4) weeks commencing January 10th, January 17th, January 24th and January 31st, 1916, in lieu of the "Rough Forgings" hereinbefore provided for shipment during that period. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of seventy-five hundred (7500) of the "Rough Forgings" per week for and during the four (4)

215 weeks commencing February 7th, February 14th, February

21st and February 28th, 1916—unless, however, "Brill" shall have notified "Forged," in writing, on or before January 8th, 1916, that "Blocks of Steel" are desired instead of "Rough Forgings," in which event "Forged" agrees to make shipment from its place, or places, of manufacture of an average of a total of seventy-five hundred (7500) of the "Blocks of Steel" per week for and during the said four (4) weeks commencing February 7th, February 14th, February 21st and February 28th, 1916, in lieu of the "Rough Forgings" hereinbefore provided for shipment during that period. "Forged" agrees to make shipments from its place, or places, of manufacture of an average of seventy-five hundred (7500) of the "Rough Forgings" per week for and during the two (2)

weeks commencing March 6th and March 13th, 1916—unless, however, "Brill" shall have notified "Forged" in writing on or before February 5th, 1916, that "Blocks of Steel" are desired instead of "Rough Forgings," in which event "Forged" agrees to make shipment from its place, or places, of manufacture of an average of a total of seventy-five hundred (7500) of the "Blocks of Steel" per week for and during the said two (2) weeks commencing March 6th and March 13th, 1916, in lieu of the "Rough Forgings" hereinbefore provided for shipment during that period. "Forged" shall have the right to anticipate the weekly shipments above specified. Shipments made by "Forged" in advance of the dates or in excess of the quantities named in the above schedule may be credited upon subsequent shipments.

Contingencies.

It is agreed that time is of the essence of this contract, provided that all obligations of "Forged" under this contract are and shall be subject to strikes, fires, floods, breakdowns of equipment, acts of God or other causes beyond control of "Forged" preventing its performance of this contract; and provided further that in the event of failure of "Forged" to make any shipments of the "Rough Forgings" or "Blocks of Steel" as hereinabove specified, "Brill" at its option may, upon notice to "Forged," refuse to accept and pay for any late shipment of "Rough Forgings" or "Blocks of Steel" which "Forged" shall not have shipped at the time or times agreed herein for such shipment, without affecting the respective obligations of "Forged" and "Brill" hereunder to ship and receive subsequent installments of said "Rough Forgings" or "Blocks of Steel."

Terms of Payment.

Cash, in New York City Funds, on the twentieth (20th) day of each and every month, covering the "Rough Forgings," or "Blocks of Steel," shipped during the preceding month, and which shall have been covered by bills from "Forged" to "Brill," dated the days that shipments are made, and with Railroad Bills of Lading thereto attached.

Inspection.

All "Rough Forgings," or "Blocks of Steel," shipped by "Forged" to "Brill," hereunder, are to be passed upon and accepted by British War Office Representative before such shipments go forward—under and in accordance with all applicable provisions of the British War Office General Specification No. L/3472-E and of Particular Specification No. L/3509, hereinbefore referred to—and "Forged" agrees to furnish "Brill," within ten (10) days following upon each and every one of such shipments, with due and proper Certificate indicating and showing that the "Rough Forgings," or "Blocks of Steel," so shipped have been passed upon and accepted by the British War Office's Representative.

Liability.

"Forged" represents to "Brill" that the "Rough Forgings" furnished will be suitable for machining, under due and proper care and attention, and under good machine-shop practice, into the Shell-Body required for "Shells, B. L. or Q. F., High Explosive, 6-inch Gun, Mark XVI (L)," as set forth and shown on Forged Steel Wheel Company's Drawing No. 6652, blueprint, copy of which is attached hereto and hereby made a part hereof. If at any time, or times, or in connection with any particular "Rough Forging," or "Rough Forgings," "Brill" wishes to make claim that the "Rough Forgings" furnished by "Forged" are not suitable for the purpose referred to and specified, then and in that event "Forged" shall be promptly notified, in writing, and be forthwith granted full, free, and convenient opportunity by "Brill" for having representatives examine thoroughly into such claim, and the basis for such claim.

218 If the representatives of "Brill" and "Forged" cannot thereafter agree, within ten (10) days, as to the justice, or injustice, of the claim so made by "Brill" upon "Forged," then in that event a third, and disinterested, party shall be forthwith agreed upon, either by choice or by lot, whose decision shall be promptly rendered, and whose decision shall be final and binding upon both of the parties hereto.

And if it shall be determined, in the manner hereinbefore provided for, that any one or any number of the "Rough Forgings" furnished by "Forged" to "Brill" hereunder are not suitable for the purpose referred to and specified, either because of improper physical dimension or imperfect material, then and in that event "Forged" agrees to promptly furnish "Brill," free of charge, and in exchange for the unsuitable "Rough Forging," or "Rough Forgings," an equal number of suitable "Rough Forgings," but without any liability, or penalty, resting upon or being imposed upon "Forged" by "Brill" in connection with the "Rough Forging," or "Rough Forgings," determined as unsuitable as hereinbefore provided for.

But, and in connection with any of the "Blocks of Steel" which may be furnished hereunder—and in view of the fact that "Forged" had no control whatsoever over the handling and manipulation of same by "Brill"—it is understood and agreed that the responsibility of "Forged" in connection with the "Blocks of Steel" shall end when such "Blocks of Steel" have been passed upon and accepted by the British War Office's Representative, and that no liability, or penalty, shall rest upon or be imposed upon "Forged" by "Brill" after 219 such "Blocks of Steel" shall have been duly passed upon and accepted by the British War Office's Representative, and shipped to "Brill," all as hereinbefore provided for.

Conditions.

It is understood and agreed that if by reason of an embargo the Shells in connection with which these "Rough Forgings," or "Blocks

of Steel," are to be used by "Brill" cannot be exported from the United States, or in the event of the cessation of hostilities, or the termination of the war before the delivery of the "Rough Forgings," or "Blocks of Steel," hereby contracted for has been completed, "Brill" at its option may terminate this Agreement, but in such event "Forged" shall be entitled to receive, and "Brill" will be obligated to pay, the unpaid purchase price of any "Rough Forgings," or "Blocks of Steel," then actually manufactured and ready for shipment, and in addition thereto a sum sufficient to cover the actual net expenditures and outstanding obligations of "Forged" made with respect to the portion of the order the delivery of which is so cancelled.

It is understood and agreed that "Forged" will supply to "Brill" without charge, the "Rough Forgings" or "Blocks of Steel" for the test shells necessary for "Brill" to supply under the said British War Office specifications hereto annexed.

220 This Agreement is executed in duplicate as of the day and year first above written.

FORGED STEEL WHEEL CO.
J. M. HANSEN,
President.

Attest:

WM. BIERMAN,
Secretary. [SEAL.]

THE J. G. BRILL COMPANY.
SAML. M. CURNEN, *President.*

Attest:

HARRY C. ELIRG,
Secretary. [SEAL.]

221 Messrs. — — —.

To guide contract.....

L/3472-E.

Blain

31/7/15.

for C. I. W.

This Specification, or any Patterns, Drawings, or other information issued in connection therewith, may only be used for a specific order, placed by an Officer of the War Department, and is not to be used for any other purpose whatsoever, without the express written sanction of the Army Council.

Shell, B. L. or Q. F., High Explosive, without adapters, Forged Steel

General Specification to Govern Manufacture and Inspection.

57

24

Approved 18th July, 1915.

1856

NOTE.—The following specification contains conditions which apply to all shells, B. L. or Q. F., High Explosive, forged 222 steel, without adapters, with the exception of those detailed in footnote* below. A separate specification has been prepared with regard to each calibre of shell in which are laid down the particulars of the sealed drawing, dimensions and proof.

* The exceptions referred to in the note above are: Shell for 6 inch and 5.4 inch B.L. and 3.7 inch Q.F. Howitzers; Shell, B.L., High Explosive, 5-inch Howitzer, Mark VI; Shell Q.F., High Explosive, 4.7-inch Mark VI.NT; Q.F. or Q.F.C. 4-inch and Q.F. 12 and 14 Pr. Shell; and all shell below 2.75-inch.

(B13532) Wt. w. 5968-2831 2500 7/15 H & S H. 15/591.

The general specification is to be read with the particular specification for the calibre of the shell ordered.

Dimensions.

1. The general dimensions of the shells are to be in conformity with the drawing. Should any discrepancy be found to exist between the drawing and this specification, reference is to be made to the Chief Inspector, Royal Arsenal, Woolwich.

Quality of Material.

2. The shell is to be of forged steel of the best quality, homogeneous throughout and free from seams, flaws and piping. It must be manufactured:

(a) In the case of shells for guns above 6 inches in calibre, by the "acid open-hearth," "electric furnace" or "stock-converter" process.

223 (b) In the case of shells for guns of 6 inches calibre and below and for all howitzers, by the "acid or basic open-hearth," "electric furnace" or "stock-converter" process.

If made by the "stock-converter" process, non-phosphoric pig iron must be used.

The composition of the steel will be determined by analysis. Apart from the iron, the following chemical elements may occur in the percentages shown in the table, viz:

	Min.	Max.
Carbon	0.55 per cent
Nickel	0.5 per cent
Silicon	0.3 per cent
Manganese	0.4	1.0 per cent
Sulphur	0.05 per cent
Phosphorus	0.05 per cent
Copper	0.1 per cent

The Contractor will take no steps to introduce into the composition of the steel any special ingredient (e. g., chromium, aluminum) without information being given previously to the Inspecting Officer.

Should the Contractor, in making tests for his own information, find that any sample contains any constituents additional to those named in the table, he is to call the attention of the Inspecting Officer thereto.

Inspection of Ingots and Billets.

3. The ingots must be top poured, and will be submitted to the Chief Inspector, Woolwich, or an Officer deputed by him, at 224 the Contractor's works, who will make the necessary arrangements to have 20 per cent cut off the top end of each ingot, and such further portion as may be necessary to ensure complete removal of the piping.

If it is desired to use bottom poured ingots, the written permission of the Chief Inspector, Woolwich, must be obtained, and in this case the discard will be 25 per cent, a portion thereof being taken from the bottom of the ingot. The proportion taken from the bottom to be left to the discretion of the Inspector.

The portion to be cut off is to be removed by sawing, and breaking after the ingot (or partially forged ingot) has cooled down, and such parting, in the case of a partial forging of an ingot, should be effected through a section of the ingot which has not been forged. Contractors who have not the necessary plant for cutting the discard from the ingot cold will be allowed to roll or forge the ingot to billet size before the removal of the discard. The area of the fractured part will be 1/6th of the sectional area of the ingot, if only one shell is to be made from it, and 1/12th if more than one shell is to be made from it.

If only one shell is to be made from an ingot, the latter, after removal of the discard, will be inspected and stamped in such manner as will ensure the base of the shell being towards the bottom of the ingot.

Such marking as may be necessary to identify the steelmaker's cast and ingot numbers will be maintained by the Contractor upon every shell throughout manufacture. Where hollow forged shell are submitted for test by day's work of drawing, the date of drawing must be similarly maintained.

4. No hardening, toughening in oil, or process of a like nature is permitted.

Tests.

5. Mechanical tests will be taken as follows:

(a) Longitudinal tensile and compression tests cut from the walls of at least 1 per cent. of the shells of every cast. Where hollow

forged, shell may be submitted in batches containing all the shell of any day's work of drawing.

(b) Two test pieces will be taken from the finished base plate at right angles to each other, and must both be capable of standing the tests shown.

Tensile.

Tenacity, tons per sq. inch. Elongation in a 2" test piece, or such piece as can be cut from the shell provided

$$\frac{\text{length}}{\sqrt{\text{area}}} = 4.$$

Yield. (Minimum.)	Breaking.	$\sqrt{\text{area}}$ (Minimum.)
Longitudinal test	19.	35 to 49.
Test from base plate	19.	17 per cent.

19.	35 to 49.	12 per cent.
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Compression.

A cylinder, of length equal to diameter, will be cold compressed to half its original length, and must stand this test without cracking.

If any one or more of the conditions in this clause be not complied with, the cast or casts of shells affected will be rejected, and must not be resubmitted without permission.

Class "C" Metal.

The Contractor will supply, free of charge, the necessary metal for testing if requested by the Chief Inspector to do so. The pieces should not be less than $\frac{7}{8}$ inches in length, nor less than 1 inch in diameter.

Test pieces prepared from the above will be required to stand the following minimum test:

Tensile.

Tenacity, tons per sq. inch. Elongation in a 2" test piece, or such a test piece as can be cut from the metal provided that:

$$\frac{\sqrt{\text{length}}}{\text{area.}} = 4.$$

Yield.	Breaking.	area.
6	12	10 per cent.

227 This metal must contain not more than 0.1 per cent. of lead. Samples may be taken from the nose-bushes of the finished shell for testing and analysis, and must be replaced at the Contractor's expense.

The metal may contain up to 1 per cent. of lead, subject to the following conditions:

(1) The present mechanical tests of the Specification are to be adhered to.

(2) The surface of the nose-bush where it is liable to come in contact with the explosive is to be well nickel-plated or tinned with pure tin.

(3) The pure tin or nickel used for coating must not contain more than 0.1 per cent of lead, and the coating is to be continuous and satisfactory as regards adhesion, in the opinion of the Inspector.

Construction.

6. The head of the shell is to be struck with the radius shown on the drawing, the point being truncated and screwed to receive the nose-bush or fuze. No sharp edge is to remain at the cavity end of the fuze hole threads, which should be chamfered if necessary.

The shell is to be turned and finished to the form and dimensions shown on the drawing.

A groove for the driving band is to be turned near the base and undercut, with the number of waved ribs shown on the drawing projecting on the bottom to prevent the driving band from turning on the shell.

Three chisel cuts may be made across the waved ribs in the groove for the driving band at an angle to the longitudinal axis of 228 the projectile to allow the air in the channels between the ribs to escape when the band is being pressed on.

A base plate made from plate steel is to be fitted in the base as shown on the drawing; the grain of the material is to be at right angles to the axis of the shell when the plate is in position. The steel is to be of the best quality, and free from lamination, flaws, cracks surface and other defects; it must be uniform in structure.

Special attention is called to the fact that the bottom of the recess for the base plate must be quite flat and smooth turned and that the face of the base plate in contact with it must be smoothly turned.

Nose-bush.

7. If a nose-bush is shown on the drawing, it may be of mild steel or Class "C" Metal; or it may be omitted and the fuze hole formed in the head of the shell, if there is a note on the drawing to that effect. The bushes, after having been machined to shape on the nose, and also internally, will be unscrewed about a quarter of an inch, so as to be readily removable for examination on delivery. Roughness and sharp edges should be removed from the cavity at the junction of the shell with nose-bush. A steel fixing screw will be fitted in the bush or head of the shell, as shown on the drawing.

(B 13532)

A 2

8. The limits (high and low) allowed are shown on the drawing.

Driving Band.

9. The driving band is to be made from a ring of drawn or electro-deposited copper, which must not contain more than .004 per cent. bismuth and .01 per cent. antimony, and is to be pressed into and in contact with the bottom and undercut of the groove in the shell all around and accurately turned to the form shown on the drawing.

Screw Threads.

10. All screw threads must, unless otherwise stated herein or on the drawing, be of the British Standard fine screw thread, and conform to the standard gauges of the Chief Inspector, Woolwich, Contractors may send their screw gauges at any time to the Chief Inspector, Woolwich, to be checked and compared with the standard gauges.

Preliminary Examination.

11. The shells, after the recess for the base plate has been cut, and after they have been grooved and finish machined internally and externally, but before varnishing or banding, will be submitted for preliminary examination.

Any shell which is not finished to the satisfaction of the Inspecting Officer, or which has any flaw or imperfection, will be rejected.

Base plates must be submitted separately when machined ready for inspection.

Varnishing.

12. While the shells are clean and free from scale or rust they are to be thoroughly coated internally with copal varnish and stoved at 300 degs. F. for 8 hours.

The Contractor must supply for analysis a sample of the liquid varnish used. Further samples will be scraped out from the shells, which must be revarnished by the Contractor free of charge.

This varnish must be free from metallic impurity in any form, the following only being permitted:

- (a) A percentage of manganese not exceeding 0.5
- (b) A percentage of lead calculated as Pb taken from scrapings not exceeding 0.05
- (c) A percentage of copper not exceeding 0.1.

This varnish must adhere firmly and present a perfectly smooth, clean and dry surface, free from cracks or flaws, impurities and other imperfections. Any shell supplied with the steel surface under the varnish not clean, free from rust, scale and foreign matter, or in which the varnish does not adhere firmly, will be rejected.

Marking.

13. The shell will be stamped on base or on the side in front of the driving band with the calibre, numeral, Contractor's initials and date of completion of manufacture as shown on the drawings. Numbers to identify the cast and ingot are to be stamped on the head.

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Delivery.

14. (a) The shells will be covered with a thin coating of vaseline or other similar anti-corrosive grease, which must be of such nature not to interfere with gauging, and they will then be delivered at the Royal Arsenal, Woolwich, unpainted for inspection and proof.

(b) The shells will be delivered in lots for purposes of proof. A lot for this purpose will consist, as far as possible, of shells governed by the same mechanical tests under Clause 5 (a) and must contain not more than 121 shells. When the number of shells so governed is less than 100, a number of casts or batches, up to a maximum of 7, may be grouped together for this purpose. In the event of further proof being required the shell will be taken from the lot supplied.

(c) The Contractor will supply, free of charge, such shells as may be required as described in Clauses 5 and 16, and such driving bands as in Clauses 15 (c) and 16. The shells expended in proof, whether fired or otherwise tested, will be the property of the Government.

Main Examination and Delivery.

15. (a) Any shell of a lot which fails to pass the Inspecting Officer's gauges, or fails to satisfy the Chief Inspector, Woolwich, of its serviceability, will be rejected.

(b) If at any time during the examination it is found that 232 defects of any nature, other than errors of machining, which involve rejection of the defective shell amount to 5 per cent, the number of the shells in the lot will be rejected.

(c) The driving band may, at the opinion of the Chief Inspector, Woolwich, be cut off one or more shells selected from the lot. Should the driving band appear not to have been thoroughly pressed home into the groove and undercut throughout, or should it fail to comply with requirements of Clause 9 as to purity, the lot will be rejected. It will also be tested by being doubled and hammered flat upon itself. Should it crack or break under this test, the lot will be rejected.

(d) One or more shells selected from the lot may be sectioned should this disclose any departure from design, or incorrect fitting of the base plate, the lot will be rejected.

If at any time during the examination of a lot it is found that 5 per cent. of the shells in the lot will depart from the approved design, further examination of the lot will be suspended.

The whole of the lot must be re-examined by the firm and those shells which are incorrect to design eliminated.

Those shells in which the departure can be rectified may be brought to approved design by the firm. The lot may then be re-submitted for examination.

Proof.

16. A percentage of the shells, filled with sand or other suitable material, will be fired for recovery from a B.L. or Q.F. gun.
 233 Particulars of the gun pressure will be found in the separate specification for the calibre ordered. Should the shells be fired set up or break up in the gun, or should the base plate be found to have shifted or to have been incorrectly fitted, or should any portion of the driving band separate from the shell before first graze or impact, the lot will be rejected, provided always that the pressure did not exceed the specification proof pressure by 0.5 ton. If the pressure did exceed this limit, a second proof to be then taken at Government expense before the lot is rejected. The pressure of the round, if not taken, will be assumed to be that of the last round fired with the same charge in which pressure was taken. Further, should the shell be reported unsteady in flight and be found, on recovery, to be without its driving band, or with the driving band loose or slipped in its seating, then the driving band of a similar number of shells to that taken for firing proof may be cut out to ascertain whether they have been properly pressed down. If they have not been pressed down to the satisfaction of the Chief Inspector, Woolwich, the lot will be rejected. If found correct, such shells will be rebanded by the Contractor free of charge.

Re-submission.

17. (a) A lot rejected under either Clause 15 or 16 must not be re-submitted unless the rejection is due to failure of the driving band or for rectifiable gauging defects.

(b) Shells put out at any period of inspection for remediable defects may be re-submitted for further examination after the 234 defects have been rectified. It is to be understood that the examination of such shells at that time will be incomplete and they are liable to rejection after rectification.

(c) If the Contractor wishes to re-invoice a lot rejected for failure of driving band under Clause 15 (c) or 16, he must remove the shells that they are liable to rejection after rectification.

(d) Rejected shells will, if considered necessary, be marked with a small rejection mark so that they can be readily identified if re-delivered.

Submission of Shell in Stock.

18. If the Contractor wishes to supply shell already made, or partly manufactured, at the date of Contract, he should request permission of the Chief Inspector, Woolwich, to submit them, and give such par-

ticulars as will enable the Inspecting Officer to see that the specification has been complied with.

Plugs.

19. Plugs for the projection of fuze holes, plugs for the protection of the tracer holes (if shown on the drawing) in transit will be supplied free of charge, on demand, by the Ordnance Officer to whom delivery is to be made.

Packing.

20. All packages are to be so marked that the goods contained therein may be readily identified with the invoice. Unless it is specified in the contract that the packing cases or other packing material are to become the property of the Government they will remain the property of the Contractor, who is responsible for their removal. Should they not be removed within two months of the acceptance of the stores, they will be disposed of, and in such circumstances the Contractor will not be entitled to make any claim for compensation. The packing cases must be marked "Returnable" or "Non-Returnable."

Inspection.

21. The shells may be inspected at any time during manufacture by, and will be subject to testing by and to the final approval of, the Chief Inspector, Woolwich, or an Officer deputed by him.

H. GUTHRIE SMITH,
Director of Artillery.

WAR OFFICE:

This specification is to be returned to the Chief Inspector, Woolwich, on completion of the (tender) (contract).

Received
Export Dept.
Aug. 23, 1915.

Ref'd to.....
Disposed of.....
Answered.....

Messrs.....

L/3509

To guide Contract OS/8158.
4/6/15. For C. I. W.

236 This specification, or any patterns, Drawings or other information issued in connection therewith, may only be used for a specific order, placed by an Officer of the War Department, and is not

to be used for any other purpose whatsoever, without the express written sanction of the Army Council.

I. L. S.
4 June 1915
Woolwich.

Shell, B.L. or Q.F., High Explosive, 6-Inch Gun, Mark XVI. (L):

Forged steel, with fixing screw.

Specification of Particulars as to Sealed Drawings, Dimensions, and Proof.

Approved.

NOTE.—This specification is to be read in conjunction with the general specification to govern the manufacture and inspection of Shell B.L. or Q.F., high explosive, forged steel, without adapters L-3472.

(1) The drawing mentioned in the general specifications is R.L. No. 22, 334-A (1) full size.

2. Nose Bush (clause 7 of general specification) The bush in this shell is to be made of mild steel, and provided with a tommy hole and a fixing screw as shown on the drawing. The bushes must be a good fit but easily removable.

237 (3) Proof (vide general specification, clause 16) The shell will be fired for recovery from a 6-inch B.L. or Q.F. gun with such a charge as will give a chamber pressure of not less than 17 tons per square inch.

DIRECTOR OF ARTILLERY.

WAR OFFICE:

This specification is to be returned to the Chief Inspector, Woolwich, on completion of the (tender) (contract).

(B 12983) Wt. w.2468-1198 50 5/15 H & S. H. 15/716.

Forged Steel Wheel Company.

Received Nov. 17, 1915, Auditor's Office, Butler, Pa.

November 16th, 1915.
File 716.

Mr. S. M. Curwen, President,
The J. G. Brill Company,
Philadelphia, Pa.

DEAR SIR:

Referring to Lines Nos. 50-62, both inclusive, of our Contract with you dated August 31st, 1915—covering a total of 147,000 Units,

238 "Rough-Forgings"—"Blocks of Steel,"—we have entered your order for a total of 16,000 "Rough Forgings" for delivery 4,000 per week during the weeks commencing October 18th, October 25th, November 1st and November 8th.

Also, and referring to Lines Nos. 62-74, both inclusive, of the same Contract, we have entered your order for a total of 20,000 "Rough Forgings" for delivery 5,000 per week during the weeks commencing November 15th, November 22nd, November 29th, and December 6th.

Also, and referring to Lines Nos. 74-86, both inclusive, of the same Contract, we have entered your order for a total of 24,000 "Rough Forgings" for delivery 6,000 per week during the weeks commencing December 13th, December 20th, December 27th, 1915, and January 3rd, 1916.

In other words, your order now stands entered on our books as a call for a total of 72,000 of the "Rough Forgings" under the Contract referred to.

Very truly yours,

Assistant to President.

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DEFENDANT'S EXHIBIT NO. 3.

Steel.

Customer's Order No. Contract 10-25-16.

Customer's Req'n No.

Date 10-25-16.

Forged Steel Wheel Company

Order No. 7084

Pittsburgh, Pa. 10/27/16.

Charge to

Hudson Metal Products Company,

No. 30 Church St.,

New York City, N. Y.

Ship to

American Brake Shoe & Foundry Company,

Erie, Penn'a.

F. O. B. Erie, Penn'a.

Remarks.

In accordance with British War Office Specifications Nos. L-3745-F (1), and L-3352-C—to be inspected by Mr. H. St. J. Cruckshank.

240 Ten thousand of these Forgings are to be shipped prior to December 1st, 1916, and the remaining ten thousand prior to December 15th, 1916—and the respective quantities which we have failed to ship by these dates will be cancelled accordingly.

Ship via B & L E

Number of Pieces.	Class.	Size.	Mark.	Weight.
		11305	207	
		11379	628	
		11399	204	
		11500	417	
		11501	215	
		11502	1046	
		11506	644	
		12006	419	
11719	so-called 9.2" Rough forgings Mark V	12054	418	
	In accordance with F. S. W. Co. Dwg.	12093	824	
	PD-59—to meet the requirements of B. & W. Co.'s Dwg.	12097	426	
	PD-962, as set forth on F. S. W. Co.'s Dwg. FSW-8350.	12173	597	
	Price \$30.00 per forging Note/	12177	415	
	Send Original bill of lading to A. B. S. & F. Co., Erie, Pa., with copy of shipping notice.	12217	204	
		12245	620	
		12275	398	
		12356	605	
		12358	619	
		12364	416	
		12403	609	
241	Original Letter-Contract attached to Auditor's Copy. Order completed.	12467	593	
		12516	181	
		12517	1014	

Pittsburgh, Pa., Oct. 25th, 1916.

Forged Steel Wheel Co.,
Pittsburgh, Pa.

GENTLEMEN:

Confirming our verbal negotiations of this morning, the American Brake Shoe and Foundry Company agrees to buy, and the Forged Steel Wheel Company agrees to sell to them, Twenty Thousand (20,000) 9.2" Mark V, British High Explosive Howitzer shell body forgings.

Above forgings to be manufactured in accordance with His Britannic Majesty's specifications, and subject to British inspection and acceptance before shipment from your works, you to furnish us with reports on each code lot, showing results of physical test and analysis of steel.

All forgings shall be annealed except those of such analysis as prevent annealing.

Price—Thirty (\$30.00) Dollars per forging, f. o. b. cars, Erie, Pennsylvania.

Terms: Net cash in thirty (30) days, New York Exchange, or its equivalent.

Deliveries: In November, 1916, ten thousand (10,000); from December 1st to 15th, ten thousand (10,000). As nearly as possible, at a uniform rate per day. You are to have the privilege of making shipment as rapidly as possible, thereby anticipating the above mentioned delivery dates.

We reserve the right to cancel the order for any forgings which may be in arrears on the above mentioned dates, namely, Nov. 30th and December 15th.

This proposition is written in duplicate, and your acceptance hereon will constitute a contract.

AMERICAN BRAKE SHOE
AND FOUNDRY CO.,
By JOS. B. TIRBELL,

Vice President.

Accepted:

FORGED STEEL WHEEL COMPANY,
By J. M. HANSEN,
President.

243 Received Oct. 30, 1916, Auditor's Office, Butler, Pa.

American Brake Shoe and Foundry Co., 30 Church Street,
New York.

Office of the Vice President and General Counsel.

October 27, 1916.

Forged Steel Wheel Company,
Frick Building,
Pittsburgh, Pa.

GENTLEMEN:

We beg leave to confirm the contract between our companies of October 25, 1916.

Shipments under this contract should be made to American Brake Shoe & Foundry Company, Erie, Pennsylvania.

Invoices should be sent to Hudson Metal Products Company, 30 Church Street, New York, N. Y., with copy of bill of lading and Inspectors' certificates attached.

Payment of these invoices will be made by Hudson Metal Products Company in accordance with the terms of the aforesaid contract and such payment is guaranteed by us.

Original bills of lading covering all shipments are to be sent to American Brake Shoe & Foundry Company, Erie, Pennsylvania.

Yours very truly,

AMERICAN BRAKE SHOE &
FOUNDRY CO.,
By JOS. D. GALLAGHER,
Vice President.

Received Oct. 30, 1916, Auditor's Office, Butler, Pa.

Forged Steel Wheel Company,

General Office, Frick Building, Pittsburgh, Pa.

File 756.

October 28th, 1916.

Mr. J. H. Allmann,
Manager of Works.

DEAR SIR:

Please refer to Office Order No. 7084, covering 20,000 9.2" Forgings for shipment to the American Brake Shoe & Foundry Company, and note:

1. After "Customer's Order No." should be inserted—"Contract 10/25/16."

245 2—After "Date" should be inserted—"10/25/16."

3—Under the heading of "Charge To" the words "American Brake Shoe & Foundry Company, No. 30 Church Street, New York City, N. Y." should be removed, and there should be inserted, instead, the words—"Hudson Metal Products Company, No. 30 Church Street, New York City, New York."

4—Where the order now sets forth "20,000 so-called 9.2" Rough Forgings, Mark V," there should be inserted and added—"In accordance with Forged Steel Wheel Company's Drawing No. PD-59—so as to meet the requirements of B. & W. Co's. Drawing No. PD-962 as set forth on Forged Steel Wheel Company's Drawing No. FSW-8350."

5—Prints of the various Drawings referred to, as well as of the Specifications set forth on the Office Order, can be obtained from Chief Engineer Christianson.

6—The Blocks of Steel required in the manufacture of these Forgings are shown on our Drawing No. FSW-2513.

7—Code Letter, and Numbers, for the Steel will be sent to you within a day or two.

8—The items of the Chemical Analyses of the Steel, and the Physical Test Reports, should be handled through this office—along

the same lines as we usually follow in connection with Steel and Forgings produced under Specifications of the British War Office.

246 9—A copy of the Shipping Notice, covering each shipment, should go forward to the American Brake Shoe & Foundry Company, Erie, Pa.—to the Hudson Metal Products Company, No. 30 Church Street, New York City—and, in triplicate, to this office.

10—Original Bill of Lading for each shipment should go forward to the American Brake Shoe & Foundry Company, Erie, Pa., with the copy of the Shipping Notice which goes to that point.

11—Our bills should go forward to the Hudson Metal Products Company, No. 30 Church Street, New York City—with a copy of Bill of Lading attached thereto.

12—The Shop Situation (in triplicate), covering Forgings produced from each Heat of Steel, should be sent to this office as usual.

Yours truly,

— — —
President.

CC to Mr. T. H. Gillespie,
Auditor.

CC to Mr. A. Christianson,
Chief Engineer.

Mr. Gillespie:

Attached letter of October 27th, from Jos. D. Gallagher, Vice-President, American Brake Shoe & Foundry Company, should be attached to the Contract now in your hands.

J. M. H.
B.

247

Forged Steel Wheel Company.

General Office: Frick Building,
Pittsburgh, Pa.

File 756.

November 11, 1916.

Mr. J. H. Allman,
Manager of Works.

DEAR SIR:

Referring to 0/0 7084, covering 9.2" Forgings for shipment to the American Brake Shoe & Foundry Company, Erie, Pa.—and with particular reference to the notation under the heading of "Remarks" thereon—"Ship via Pennsylvania System"—please note that if it is at all possible to get the necessary cars when, and as we want them, I would prefer to have these shipments go forward

via the Bessemer & Lake Erie Railroad (instead of the Pennsylvania System), and I would thank you to arrange and be governed accordingly.

Yours very truly,

President.

CC to Mr. T. H. Gillespie,
Auditor.

CC to Mr. A. N. Fay,
Purchasing Agent.

Note on F. S. W. Co. Order
"Covered by S. S. C. Cos. Ord. C-7112"

248 Forged Steel Wheel Company.

General Office: Frick Building.

File 756.

Pittsburgh, Pa., November 24, 1916.

Mr. J. H. Allman,
Manager of Works,

DEAR SIR:

In connection with the 9.2" Forgings which we are shipping to the American Brake Shoe & Foundry Company, Erie, Pa.—via Bessemer & Lake Erie Railroad—under 0/0 7084—please note that the Vice President of this company just wires us:—

"Agent of the Bessemer at Butler states that your people are not furnishing billing instructions until about eighteen hours after Cars are set on their tracks—can you not have this corrected so that shipments will move to Erie promptly?"

We are desirous of expediting these shipments all we possibly can, and of helping this customer accordingly, and I would thank you to look into this matter in order to see if the foregoing delay cannot be corrected—and to then advise me as to what you have been able to do in the premises.

Yours very truly,

President.

CC to Mr. T. H. Gillespie,
Auditor.

CC to Mr. A. N. Fay,
Purchasing Agent.

249

Forged Steel Wheel Company.

General Office: Frick Building.

File 756-6.

Pittsburgh, Pa., December 16th, 1916.

Mr. J. H. Aliman,
Manager of Works.

DEAR SIR:

The records indicate that up to December 16th we had made a total of 12,024 of the 9.2" Forgings as applying under and against Office Order No. 7084 (covering a total of 20,000 for shipment to the American Brake Shoe & Foundry Company)—and had shipped a total of 9,322 of same.

Under arrangements which we have made with this Customer, we will consider this office Order No. 7084 as Completed—as soon as we have shipped to them the entire product of the heats of steel represented in the total of 12,024 forgings made, as above, less those which we use for test purposes and which we reject under our own inspection before shipment, of course.

The balance yet to ship of this total of 12,024 Forgings should be forwarded at the earliest possible moment, and I would thank you to be governed accordingly—sending me, just as soon as the order is completed, a detailed list of the Heats of Steel involved in the total of 12,024 Forgings, with the number of Forgings made per Heat, the number of Forgings used for Test per Heat, the 250 number of "rejects" per Heat, and the number of Forgings shipped per Heat.

Such of these 9.2" Forgings as have been already made in excess of the total of 12,024, as above—and such further Forgings as we may hereafter make, of this design—will be applied (as per my separate letter to you of even date), as under and against, first, our Office Order No. 5801 (until the same is completed), and, secondly, our Office Order No. 6822 (which is now being revised so as to cover 9.2" Forgings of the Mark V type).

Yours truly,

President.

CC to Mr. A. N. Fay,
Purchasing Agent.

CC to Mr. T. H. Gillespie,
Auditor,

251

Forged Steel Wheel Company.

General Office: Trick Building,
Pittsburgh, Pa.

File 756.

Mr. J. H. Allman,
Manager of Works,

December 22, 1916.

DEAR SIR:

Referring to 0/0 No. 7084, which originally called for a total of 20,000 9.2" forgings for shipment to the American Brake Shoe & Foundry Company, Erie, Pa.—please note that the total number thus far shipped is 11,719—and I would thank you to note that we will consider this total of 11,719 forgings as completing our attention to this order—and I would thank you to change your records and be governed accordingly.

Yours very truly,

CC to Mr. T. H. Gillespie,
Auditor.*President.*

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DEFENDANT'S EXHIBIT NO. 4.

Treasury Department,
Washington, D. C.

January 18, 1917.

Office of Commissioner of Internal Revenue.

CT-Mim-1464.

Munitions.

SIR:

Reference is made to the conference on munitions tax held in this office January 3, 1917, and the questions presented and the discussion which followed in connection with the several inquiries, and you are informed that careful consideration has been given to all of the questions and the discussion which followed and answers will be given hereinafter in the order in which they were orally presented.

Query I.

Shall the manufacturer of a completed article consider as part of that article the appendages necessary to make it of use? For illustration, shall a company manufacturing revolvers include in its return the holsters purchased by it and sold with the revolvers, or shall

253 the manufacturer of revolvers treat the holster as part of the cost at the price that is paid for it, and leave it to the manufacturer of the holster to make a return on the manufacture of the holster as a part?

It is the opinion of this office that the profits derived from the manufacture and sale of holsters is subject to the munitions tax as there can be no doubt that holsters are an appendage of a firearm. It is therefore held that when a manufacturer of a revolver or other firearm, with which the holster is sold to contain or carry the firearm, which manufacturer does not manufacture holsters, but purchases them, disposes of the completed article, that is, the firearm and holster *per se*, the entire profits from firearm and holster combined are subject to the excise tax of 12½%. If, however, the manufacturer of the firearm sells the holster, which he purchases, as a separate and distinct unit, that is, not in connection with or as an appendage of or to any firearm which he manufactures and sells, he will, as to such sale, be considered a dealer, and any profit he may derive from the sale of the holster under such circumstances, will not be subject to the tax.

The same ruling applies to the manufacturer of a machine gun. That is, if any of the equipment and appendages are relatively complete within themselves and designed or manufactured for the special purpose of being used as component parts of a completed machine gun, and, by reason of some peculiar characteristic, lose their identity as commercial commodities, and without further treatment, cannot be used for any purpose other than that for which they were designed, the profit received by the manufacturer from the 254 manufacture and sale of such equipment and appendages will be subject to tax, and if the machine gun, with all such equipment and appendages, even though they are purchased in the open market, is sold as a unit, that is as a completed article, the entire profits arising from its sale will be subject to tax; that is, the profits arising from the sale of the equipment and appendages, if any, if sold with and as a part of, or essential to the manufactured gun, are subject to tax as are the profits from the manufacture and sale of the gun itself, since collectively they constitute a munition. The cost of such equipment and appendages is, however, a proper deduction in ascertaining net profits.

Query II.

Shall the same rule be followed where the appendage is only partially manufactured at the time it is received?

The same ruling will apply as to the straps and buckles which are attached to the rifles. So long as straps and buckles are detached each from the other, they will be considered as raw material, to the manufacturer of the rifle or firearm and the cost thereof is deductible in determining the taxable profits, but the profit, if any, derived from the manufacture and sale of the appendage, must be added to the profit from the sale of the rifle or firearm of which the appendage is a part, and returned for the purpose of the munitions tax.

Brass sheets from which cartridge shells are made are raw material to the manufacturer of the shells and the cost of the same is deductible in a return of annual net profits of the manufacturer.

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Query III.

Where the manufacturer manufactures part of his raw material, how shall his return be compared with that of a manufacturer who buys his raw material? For illustration if one company manufactures its own brass, and another company buys sheet brass, how shall their respective returns be compared?

The manufacturer who makes a part of his raw material will prepare his return in the same manner as one who purchases his raw material. The cost to the manufacturer of the raw material will be deductible as an expense of manufacture distributed to the several items of deduction in the return, whereas the cost of the purchased raw material will be included under item (a) as specified under Section 302.

The fact that the manufacturer makes his own raw material at a price possibly less than the one who purchases his raw material, does not warrant his making his returns upon a different basis. He may, by producing his own raw material at a less cost, derive a larger profit from the manufacturer of munitions, and thus would be subject to a larger tax.

In both cases the manufacturer of the munitions or parts thereof, would include in his deductions only the actual cost of the raw material, and his taxable profit would be the excess of the selling price over the actual cost of the finished product, plus other authorized deductions.

256 In the case of a munitions manufacturer, who manufactures his own raw material, the manufacture of raw material is part of the process of manufacturing the finished article, and only the actual cost including the initial outlay for material, is deductible from gross receipts.

For the purpose of arriving at the taxable income, it is immaterial whether the raw material is produced or purchased by the munitions manufacturer. In either case only the actual cost of the raw material will be deductible from gross income.

Query IV.

If munitions are sold to the Government on contracts made prior to the 8th of September, 1916, will the munitions tax thereon be remitted by the Government? (Repairs for old guns.)

The law specifies that every person manufacturing certain articles, parts thereof and appendages, shall be subject to an excise tax based upon the net profit actually received by or accrued to such person, from the sale and disposition of such articles, and it is the opinion of this office there cannot be any distinction between one who manufactures and disposes of his product to the United States Government and one

who manufactures and disposes of his product to a foreign government or otherwise. The law seems to be very specific on this point and in the administration of the law this office will not differentiate between one who manufactures and sells to the United States Government and one who manufactures and sells to others, and for administrative purposes it is immaterial whether the contracts were 257 entered into prior or subsequent to September 8, 1916.

Those manufacturers who make repairs on munitions, either for the United States Government or as regular commercial work, will not be subject to the munitions tax provided the repairs so made are bona fide repairs and do not involve the manufacture and sale of a completed part of a munition. The expenses in connection with this branch of the work of the manufacturer, such as labor, material, etc., on repair work, must be eliminated as a deduction in the return, since the profit is not considered income for the purpose of this tax.

The expenses of reworking explosives, although no profit is derived therefrom, which have been returned to the manufacturer for the reason that the explosives do not meet the specifications of the contract, are deductible, as are the expenses of the original manufacture, provided the expenses were not incurred in the reworking of explosives manufactured pursuant to a contract fully completed prior to January 1, 1916. In the case of those explosives which are reworked by a manufacturer other than the original producer, and from which reworking the manufacturer derives a profit, it is held that such profit is not derived from the manufacture and sale of explosives, but represents the difference between the cost of the work and the amount received for the same—the entire amount received being compensation for services rendered and not for explosives manufactured and sold. Therefore the profits are not subject to tax.

258 Since any profits derived from these reworkings are not subject to the tax imposed by this Title, the expenses in connection therewith are not deductible and must not be included in the return made for the purpose of this tax.

Query V.

Shall those who assemble the finished or partly finished parts, and complete, construct or unite them into a completed and finished munition, be considered manufacturers of munitions, or shall the return be left solely to the manufacturer of parts?

The question when boiled down according to the sentiment of the conference was—Is one who collects the parts that enter into the construction of a munition, and then constructs the finished article, of such parts, a manufacturer of munitions?

There is no dispute in case the raw or manufactured material is taken and shaped into parts and then such parts constructed into the finished and completed article by the same person, firm or corporation, for in such case the liability and status would be clearly defined as that of a manufacturer of munitions. But the question arises as to

the status of the person who turns out the finished and completed article from previously manufactured parts, which person is in no wise connected in the business with the one manufacturing the parts of which the completed article is composed.

The Supreme Court of Louisiana has defined manufacturer as "one who is engaged in the business of working raw material into wares suitable for use, who gives new shapes, new qualities, new 250 combinations in material which has already gone through some artificial process."

Bouvier defines a manufacturing corporation as "one engaged in the production of some article, thing or object, by skill or labor, out of raw materials, or from matter which has already been subjected to artificial force or to which something has been added to change its natural condition."

Webster defines manufacture, "To work, as raw or partly wrought materials, into suitable forms for use; to fabricate, to invent; also to produce mechanically."

Webster defines the word fabricate when applied to manufactures as "To frame; to construct; to build; to form into a whole by uniting parts."

This office is of the opinion that one who collects the parts, whether complete or partially complete, and, by assembling such parts, constructs a finished and completed article ready for use, is a manufacturer of munitions, within the meaning of the munitions tax law, and the net profits from the sale by him of the munitions so manufactured, will be subject to the tax imposed by this Title.

Query VI.

If a corporation, with several plants in operation prior to the war, manufacturing different products, shall set up a separate plant for the manufacture of munitions, and, in, the manufacture of munitions buys from one of its other plants materials to be used in or for the manufacture of munitions, is the munition part of this corporation entitled to charge as raw material for things entering 260 into the manufacture of munitions the cost plus a profit on the material purchased from one of the associate plants?

In concrete form the question as presented in the discussion which followed the reading of this question is whether the profits from the munitions are the difference between what the manufacturer receives from the sale of the munitions and the cost of the raw material which it also manufactures, or the difference between the selling price of the munitions and the price it could have obtained from the sale of raw materials entering into the product at their current market price, that is, the price at which the raw material was actually charged to the munition plant.

The question is similar to Query II and the answer thereto must necessarily be the same. The fact that the manufacturer keeps its accounts in such a manner that the actual cost of production of its raw material used in the manufacture of munitions is accurately

shown and it charges the munition plant for the raw materials at what is considered a fair market value, would in no wise affect the ruling.

Each manufacturer making munitions must necessarily have raw material from which to construct a completed article; this raw material may go through various and sundry processes before it reaches a completed state and at times may be of such a character that it can be disposed of on the open market for a price in advance of its cost, but by foregoing a sale at any stage of the process of manufacture of a munition, the manufacturer will not be permitted to charge the current market price of raw material as it leaves one branch of its plant to go to another to be finally made into 261 a munition, as the cost of raw material. The process of manufacturing the munition begins with the initial work on, or in the production of the raw material, and is continuous until the munition is completed. Profits, as stated hereinbefore, must be determined by the difference between the actual cost and selling price of munitions, and no intermediate values set up to absorb a supposed profit, at a certain stage, on raw materials manufactured during the course of the manufacture of munitions, will be permitted for the purpose of this tax, notwithstanding the fact that such raw materials might have been sold at a profit. Having chosen to use the raw material in the manufacture of completed munitions, the so-called profit comprehended in the market value of the raw material when it goes to the munitions plant, must be reflected in the profits derived from the sale of the munitions and will be so returned.

Query VII.

The regulation provides for the exemption of interest paid on loans within the year. Should not this be changed to cover only the interest accrued during the year? Otherwise bonuses and discounts paid on the 15th of December, 1915, for money used through 1916 in the manufacture of munitions, can in no way be deducted from the munitions tax, though the entire use of the money would occur in the year 1916. Should not this be treated on the basis of the interest that has accrued rather than the interest that is paid during the year.

262 In your letter of January 5, 1916, you submit in explanation of this, the following statement:

"Many manufacturers of munitions when they undertook contracts made arrangements to secure the funds with which to carry out the contracts and paid commissions of bonuses for the money and in some instances undoubtedly paid the interest in advance.

As indicated in the query these payments may all actually have been made prior to the year 1916, but it is patent that under good accountancy they should be charged throughout the year as part of the expense of doing business, and it is respectfully submitted that the regulations promulgated should be amended in such a way as to permit the manufacturers who are subject to these condi-

tions to charge pro rata throughout 1916 for the use of this money as an expense of the contract."

Since Title III of the Act of September 8, 1916, provides that an excise tax of $12\frac{1}{2}\%$ upon the entire net profits actually received or accrued for said year from the sale or disposition of certain articles manufactured within the United States, shall be assessed against the manufacturer thereof, and it specifies the manner in which such net profits shall be ascertained and enumerates those items which may be deducted by the manufacturer, it is the opinion of this office that those commissions or bonuses which were paid prior to January 1, 1916, for obtaining contracts for munitions and which contracts were fulfilled and deliveries made and the munitions paid for after

January 1, 1916, would be allowable deductions as such necessary expenses as are contemplated by Subsection (b) of Section 302 of the Act referred to, and therefore would constitute allowable deductions in ascertaining net profits for the purpose of the tax. Such commissions and bonuses should, however, be spread over the life of the contract with respect to which such commissions and bonuses were incurred and the pro rata proportion of the same may be deducted from the gross income of each year until the contracts are fully performed.

As to interest paid in advance, that is prior to January 1, 1916, on money borrowed to secure contracts, or to meet the needs of the business in connection with the manufacturer of munitions or parts thereof, even though such contracts are fully performed subsequent to January 1, 1916, it is held that the interest so paid is not deductible from the income of any year other than that within which it is paid. That is to say, interest paid in 1915 on money used in 1916 in the performance of contract, is not deductible from the income of the latter year, for the reason that paragraph (c), Section 302, specifically limits the deductible interest to "interest paid within the taxable year on debts or loans contracted to meet the needs of the business, the proceeds of which have been actually used to meet such needs."

In the event, however, that the money was borrowed to build and equip special plants, that is to erect buildings and to purchase and install machinery for the special purpose of manufacturing munitions or parts thereof, the interest so paid in advance and prior to January 1, 1916, should be added to the cost of such special plants

which were erected and installed for manufacturing munitions or parts, and the entire cost of such special buildings, including in such cost, the advance interest payments made prior to January 1, 1916, on money borrowed and used for this purpose, would be subject to depreciation and amortization charges in a return of annual net profits. In such cases the interest paid prior to 1916 on money borrowed to erect and equip such special plants, is as essentially a part of the cost of the buildings and machinery as is the principal so applied.

Query VIII.

The regulations provide that, where only a part of the plant is used in the manufacture of munitions, the running expenses should be apportioned to the gross profits of the entire business. Since the tax is paid upon the net profit, should not the words "gross profits" be changed to "net profits?"

This office is of the opinion that "gross profits" as used in the regulations should not be changed for the reason that in the absence of a segregation of expenses, the basis outlined in the regulations for ascertaining net profits provides a means whereby the expenses deductible may be more accurately ascertained than in any other manner. If the gross income of a manufacturer from the sale of munitions is proportionately larger than the gross income from his other manufacturing business, it follows that his expenses for munition tax will be proportionately larger and he should have a deduction commensurate with his income for munition tax purposes. This applies, however, only in case the books and accounts do not show a segregation of expenses as to the different lines of manufacture carried on by the person making the return.

Query IX.

Capital stock tax and its relation to the munitions tax: the latter being deductible from the former tax, how shall this be arrived at because of the payment required in January, 1917, on account of the stock tax?

The Act provides that the capital stock tax returns shall be made in January and the munitions tax returns on or before March 1, upon which basis the tax is paid, and it therefore follows that the munitions tax not having been paid at the time the capital stock tax return is prepared and filed, the amount thereof paid in 1917 cannot be used as a credit against the capital stock tax paid for the year 1917.

As to whether the munitions tax paid when in excess of the capital stock tax paid, can be used as a credit in subsequent capital stock returns, has not been definitely passed upon by this office since that question will not become acute until later. When the question becomes pertinent to a return, it should be again presented to this office.

Query a.

You asked, referring to paragraph (f) of Section 302: "Now is it necessary in order to get credit for such amortization, that it should be set up on the books until the end of the year?"

The amortization deduction should be set up on the books as soon as it is ascertained, but since in practically all cases it cannot be

definitely determined until the end of the year or even later, when the net profits have been determined, it will be permissible, in order to get credit in the return, to set up the amortization charge as soon as ascertained, in any event not later than as of December 31 of the year for which the return is made.

Query b.

"The act provides that the tax shall cease to become operative the year after the President's proclamation that the war is over."

This office, in the administration of the law, must necessarily be governed by the provision of the Act and will insist on returns of munition manufacturers for one year after the President issues a proclamation that the war has terminated. If Congress amends the law and provides for another means of determining the ending of the war, this office will, of course, be guided accordingly.

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Query c.

"The intent of this law was to derive the tax from the profits accrued from munitions only * * *."

"The title of the tax is 'Munition Manufacturers' Tax,' and it is obviously intended that the tax is to be assessed from the profits derived from munitions orders only, and not from profits derived from products supplied otherwise."

Section 301 of the Act specifically exempts the profits derived from the sale of blasting powder and dynamite used for industrial purposes, and cartridges, loaded or unloaded, caps or primers used for industrial purposes. It is therefore held that the profits derived from such articles enumerated in the law as being used exclusively for industrial purposes, that is, used in connection with or in the promotion or operation of some industry, are exempt from this tax.

The profits derived from the sale of those articles enumerated in Subsections (a) to (e) inclusive, of Section 301 of the Act for commercial or sporting purposes, are held to be subject to tax. A careful reading of the section will show conclusively that the law is mandatory with respect to the tax on the profits of manufacturers of the articles therein mentioned, except the profits derived from the sale of blasting powder and dynamite, cartridges, loaded and unloaded, caps or primers used exclusively for industrial purposes, and makes no provision whatsoever to exempt or relieve from tax, a manufacturer

268 in the United States who derives profits from the sale of the articles mentioned, even though they are sold for sporting or other purposes only in the United States in the regular course of domestic business of the manufacturer. In fact, except in the Title, that Act nowhere mentions munitions and imposes the tax on the manufacturers of certain articles, regardless of the purpose for which they are used, with the exceptions noted.

Query Contained in Your Letter of Jan. 5, 1917.

"Manufacturer A makes a contract with Manufacturer B to sell B material for use by B in manufacturing munitions, which contract results in a loss to A. A also has a contract for the manufacture of munitions, which is profitable.

Is it not permissible for A, in making his return, to deduct as losses on the contract with B from the profits he has derived from the manufacture of munitions and pay the tax only on the difference?"

It is assumed that manufacturer A in selling material to manufacturer B is not engaged in the manufacture and sale or disposition of an article or part thereof enumerated in Section 301 of the Act when he furnishes A raw material to be used in the manufacture of a munition, any more than he is engaged in the manufacture and sale or disposition of "any article or part thereof" when he furnishes materials to a manufacturer who does not manufacture a munition, within the meaning of the law. Consequently A cannot

deduct from the profits derived from the manufacture and
260 sale of munitions, any loss he may sustain, by reason of his
contract with B. A is taxable on the profits derived from
the sale of munitions and he cannot offset that profit by any loss he
may have sustained on any article manufactured and sold, the
profits of which are not subject to this tax.

Respectfully,

W. H. OSBORN,
Commissioner.

Plaintiff's Points.

Filed Jan. 3, 1919.

The court is respectfully requested to charge the jury as follows:

1. Under the pleadings and evidence in this case their verdict should be in favor of the plaintiff and against the defendant for the full amount of the tax paid, to wit, \$246,920.18, with interest at the rate of 6% per annum from the 27th day of November, 1917.

If the court refuses to charge as above, then it is respectfully requested to say:

2. If the jury believe from the evidence that the rough steel forgings manufactured by the plaintiff were not parts of projectiles, their verdict should be in favor of the plaintiff for the full
270 amount of the claim in this case, to wit, \$246,920.18, with interest at the rate of 6% per annum from the 27th day of November, 1917.

3. If the jury believe from the evidence that the rough steel forgings, upon the profit in the manufacture and sale of which the tax in this case was levied, were sold by plaintiff to various

corporations or persons who were engaged in the manufacture of projectiles or parts of projectiles, and that said rough steel forgings constituted the materials which were purchased and used by said persons in the manufacture of projectiles or parts of projectiles, then the jury should find a verdict for the plaintiff for the full amount of the claim in this case, to wit, \$246,920.18, with interest at the rate of 6% per annum from the 27th day of November, 1917.

4. It is the uncontradicted evidence in this case that part of the tax levied and collected by the defendant from the plaintiff was 12½% on \$754,620.88, which represents the profits made by the plaintiff in the manufacture of steel bars which were subsequently forged by it or the Standard Steel Car Company, and that the 12½% tax on the profit of converting or forging the steel bars into black steel forgings had already been paid to the United States Government by the plaintiff and the Standard Steel Car Company before the tax in controversy was levied; and if the jury believe that the said steel bars constituted the crude or elemental products or substances necessary to the manufacture of parts of projectiles and that they could not without the application of skill or science

271 become component parts or elements in the finished article or unit, the jury should find that they were raw materials

within the meaning of the regulations of the Department of Internal Revenue and the Act of Congress and that the tax should not have been levied upon the profits made in the manufacture thereof, and the jury should render a verdict for the plaintiff in the sum of 12½% on said \$745,620.88, to wit, \$94,327.61, with interest at the rate of 6% per annum from the 27th day of November, 1917.

5. It is the uncontradicted evidence in this case that in the tax levied and collected by the defendant from the plaintiff was included the sum of 12½% on \$353,599.92, to wit, \$81,899.99, and that said tax was levied upon the profit made by the plaintiff on steel purchased from other steel manufacturers and delivered to the Standard Steel Car Company for forging and upon which the Standard Steel Car Company paid the 12½% tax on its forging profit; and if the jury believe that the plaintiff did not manufacture said steel or said forgings, their verdict should be in favor of the plaintiff for said amount, to wit, \$81,899.99, with interest at the rate of 6% per annum from the 27th day of November, 1917.

6. It is the uncontradicted evidence in this case that included in the amount of tax collected was 12½% on \$567,140.67, which sum constituted the profit on steel bars manufactured by the plaintiff, which were delivered to the Standard Steel Car Company, upon the profit from the forging of which the tax of 12½% was paid by the Standard Steel Car Company; and if the jury believe from the evi-

272 dence that the manufacture of said steel bars by the plaintiff constituted only the manufacture of raw materials which

were necessary in the manufacture of parts of projectiles but which without the application of skill or science could not become

component parts or elements in the finished projectiles, their verdict should be in favor of the plaintiff for 12½% on said sum, to wit, \$70,892.58, with interest at the rate of 6% per annum from the 27th day of November, 1917.

Defendant's Points.

Filed Jan. 3, 1919.

The Court is respectfully asked to charge the jury as follows:

First. The plaintiff claiming in this action that its profits are exempt from taxation must assume the burden of establishing the exemption claimed by it by clear and satisfactory proof of all the facts and of all the circumstances essential to the existence of the particular exemption under consideration.

Second. If the product in question were designed and manufactured by the plaintiff for the express purpose of being used as any part of a shell, and the manufacturing had proceeded to a degree that the product had lost its identity as a commercial commodity for general purposes, the plaintiff must be regarded as manufacturing parts of munitions.

273 Third. If the plaintiff was engaged in manufacturing any part of a shell while producing the forgings for shells in question made in its own plant, it is liable to a munition tax under the Act of September 8, 1916.

Fourth. Under the Act of September 8, 1916, the plaintiff in computing its profits may deduct the cost to it of the materials used in manufacturing the forgings for shells in question, but cannot deduct the market value of the materials used.

Fifth. If the products in question are any part of a shell, the plaintiff is liable to a munition tax on the profits realized from the sale thereof, whether the plaintiff did the manufacturing in its own plant or hired the Standard Steel Car Company to do the manufacturing for it.

B. B. McGINNIS,
*Special Assistant United States Attorney
and Attorney for Defendant.*

Filed Jan. 7th, 1919.

And now, to wit, this 7th day of January, A. D. 1919, comes the defendant, C. G. Lewellyn, by his attorney, and moves that the Court grant a new trial in the above entitled case for the following reasons and grounds hereinafter set forth in support of motion:

First. The Court erred in affirming the first of plaintiff's points.

Second. The Court erred in directing the jury to render a verdict in favor of the plaintiff.

Third. The Court erred in refusing to affirm the second and third of defendant's points.

Fourth. The Court erred in charging the jury that under the Act any part of a shell meant a component complete part of a shell.

Fifth. The Court erred in charging the jury that a product set aside and indelibly stamped as a portion of a shell and which had ceased to be a commercial commodity was not any part of a shell.

Sixth. The Court erred in refusing to leave to the jury the question of fact whether or not the product in question had been 275 manufactured to the degree that it had lost its identity as a commercial commodity and was being manufactured for the express purpose of being used as any part of a shell.

Seventh. The Court erred in not directing a verdict in favor of the defendant.

Eighth. The Court erred in refusing to grant defendant's motion for non-suit.

Respectfully submitted,

B. B. McGINNIS,
Attorney for Defendant.

Opinion.

THOMSON, J.:

The Forged Steel Wheel Company, a Pennsylvania corporation, brought an action against the Collector of Internal Revenue for this District, to recover the sum of \$246,920.18, being the amount of a certain tax levied upon the plaintiff on the net profits received by it from the manufacture and sale of certain steel forgings used in the manufacture of shells. The tax was imposed under Section 301 of the Act of Congress approved September 8, 1916, establishing what is known as the Munitions Manufacturers' Tax. The tax was paid under protest, and in the action for its recovery binding instructions were given for the plaintiff. The case is now before the Court on a motion for a new trial.

The plaintiff is a manufacturer of iron and steel by the open hearth process from raw material consisting of pig iron and scrap. These materials are converted into steel, which is then cast into ingots, and these are rolled into billets, blooms, rounds, and other commercial shapes. In 1916 certain corporations of the United States and certain persons abroad, who were engaged in the manufacture of projectiles, made contracts with the plaintiff by which the latter agreed to manufacture, sell and deliver certain quantities of rough steel forgings for shells. These were usually denominated in the contracts as shell forgings, which were to comply with the specifications imposed by the British Government upon the manufacturer of high

explosive projectiles. These specifications in so far as applicable, were in turn imposed upon the manufacturer of the rough steel forgings supplied to such manufacturers, as to chemical constituents, strength, and so forth, of the steel, size, shape, and freedom from mechanical defects of the forgings, so that they would pass the British inspection as forgings or materials fit for use in the manufacture of high explosive shells. In order to fill these contracts, the plaintiff took commercial rounds between six and seven inches in diameter, of a grade of steel used commercially for many different purposes. These were nicked and broken into lengths of eighteen inches. They were then heated and put through two forging processes; by the first a hole was pierced from one end to within about two inches of the other end; by the second process, the pierced steel was elongated by drawing through three successive rings in a hydraulic press, leaving 277 the forging in the shape of a cylinder open at one end and closed at the other, in which shape they were delivered under the plaintiff's contracts. Many of these forgings were manufactured by the plaintiff from rounds which the plaintiff had itself manufactured. Some were made from steel rounds which it had purchased from other steel manufacturers, and in some instances the steel was purchased by the plaintiff and the forging done for it by others. Through these three methods the plaintiff furnished the rough forgings called for in its several contracts.

The subsequent manufacturer of the completed shell bodies, put these rough steel forgings through twenty-seven distinct and separate processes. Their weight was reduced from 170 pounds to about 77½ pounds, 55 per cent of the steel in the forgings being planed and bored away. The shell body when completed, must be accurately and delicately finished; must be exact in size, both internally and externally, within a limit of a few thousandths of an inch; must be exact in weight and absolutely centered or true to the longitudinal axis of the shell. The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body projecting slightly so as to engage the rifling of the gun. This gives the shell its rotary motion necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the 278 fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed and designed not only individually but with reference to each other, when assembled together, constitute a high explosive shell.

Section 301 of the Act of Congress under which the tax question was levied, reads as follows:

"Sec. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes: (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes: (c) projectiles, shells, or torpedoes, of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition: (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e), shall pay for each taxable year, in addition to the income tax imposed by Title 1, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: Provided, However, That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such 279 person prior to January first, nineteen hundred and sixteen."

The interpretation of these words of common speech, is within the judicial knowledge and a matter of law.

Sonn vs. Magone, 159 U. S., 417.

In harmony with prior decisions, the Supreme Court in Gould vs. Gould, 245 U. S. 151, said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In considering the Act, in order to avoid confusion and in the interest of clearness, I will for the moment treat it as though it dealt with projectiles alone. It is entirely clear that the tax is laid on the manufacturer who makes and sells projectiles or parts of projectiles; and the measure of the tax which he is required to pay is 12½ per cent on the net profits received from the sale of such manufactured projectiles or parts of projectiles. It is not contended by the Government that the plaintiff ever manufactured any projectiles. The claim is that it was manufacturing a part of projectiles, and is therefore liable for the tax. The sole question, therefore, is, was the thing which the plaintiff manufactured, a part of a projectile within the meaning of the Act of Congress? If not, it is not liable

for the tax in question, because it is not manufacturing the 280 thing the net profits from the sale of which, is made taxable

under the Act. It seems clear, therefore, that the decisions which deal with manufactured articles and parts thereof, and article-partially manufactured, are applicable and important in interpreting this statute. As much so, as if the tax were laid upon the thing

itself, because it is only to those who manufacture and sell the designated thing, that the statute is applicable at all. There is an evident distinction between a partial and a complete manufacture. In *Vandergrift vs. United States*, 164 Fed., 65, Judge McPherson said:

"These decisions amply support the proposition that, in order to constitute a manufactured article, the processes of manufacture devoted to it must be so far completed as to render the article ready for common use, known and designated by a common name, without additional processes of manufacture."

In *United States vs. Prosser & Son*, 177 Fed., 569, the merchandise in question consisted of crank shafts, crank axles, piston rods, and so forth. It was contended that these should have been assessed as forgings of whatever "degree or shape of manufacture." Judge Martin, of the Southern District of New York, said:

"As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal."

In *Bromley vs. United States*, 153 Fed., 958, Judge Buffington, speaking for the Circuit Court of Appeals of the Third Circuit, said:

"In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings, had merged into the higher mechanical plane of a manufactured article."

In *Tide Water Oil Company vs. United States*, 171 U. S., at page 218, Judge Brown said:

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only to be put together to make the finished article."

The same Judge, at page 217, said:

"It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacturing stops short of the completed article, can only be said to be partially manufactured within the meaning of this section."

282 Thus the distinction between a completely and a partially manufactured article, is reasonably clear. What is meant by a part as used in the Act of Congress? Generally speaking, a part of a thing denotes a constituent or fraction of the whole, being synonymous of portion, piece, section, segment or division. A part is a portion taken from the whole and still retaining all the properties of the whole, except only extent; while, as said by Justice Brown, "a partial manufacture is a mere stage in the development of the material toward an ultimate or predestined product." The word "part" as used in Section 301, I think was well chosen and that its meaning is not obscure. We must assume that Congress knew well the distinction between a completely manufactured thing, or part of a thing, and a partial manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture. In addition to projectiles, referred to in the Act, most of the articles mentioned therein, as torpedoes, cannon, machine guns, motor boats and submarines, are composite articles made up of many separately manufactured parts. On the profits from the manufacture and sale of these composite things, specified in (b), (c), (d) and (e), the tax was laid: Congress then adding the words "or any part of any of the articles mentioned." In many of the tariff acts, the meaning of the word "part" has received judicial interpretation in numerous cases. In *United States vs. 31 Boxes*, 28 Fed. Case, 56, in the Southern District of New York, the question was whether pieces of round iron cut into suitable lengths, some being straight and others bent to a U-shape, which were adapted to be formed into the links of cables, were dutiable under the description of 283 "cables and parts thereof" under the Act of 1824. The Court held these articles not to be parts of cables, saying:

"It is clear to my mind, that in the sense of the Act of 1824, nothing can be deemed part of a chain that is not as to itself, as finished and complete as the entire chain."

In *Vanacker vs. Spaulding*, 28 Fed. Rep., 88, small India rubber bags intended to be inflated, thereby making a small balloon to be used as a children's plaything, were not dutiable as toys. The Court said:

"In order to make them salable as toys, they must be inflated, enclosed, so as to retain the gas, and although this is but a slight addition to them, still they cannot be called playthings or toys until this process is completed."

In *re Blumenthal*, 51 Fed. Rep., 76, it was held that small polished discs of mother of pearl, which were complete as buttons, lacking only the holes through the centers, were held not dutiable as buttons. Judge Lacombe said:

"According to the usages of common speech, these articles here are not complete buttons, because they lack the essential element of a devise whereby they may be affixed to garments."

In United States vs. Simon, 84 Fed., 154, it was held that India rubber tubing, in meter lengths, colored, used chiefly in making stems of artificial flowers, were not dutiable as parts of artificial flowers.

In Hunter vs. United States, 134 Fed., 361, it was held 284 that pieces of paper cut by machinery into appropriate shapes and sizes so that they could be folded and pasted and would then form an envelope, were held not to be envelopes, as certain substantial steps in the process of manufacture still remained to be done.

The Board of General Appraisers, In re Protest of Reiss Brothers, T. D., 16977, held that blocks of meerschaum, shaped like pipe bowls and so far advanced in manufacture as to be unfit for any other purpose, were not dutiable as pipe bowls, because they had not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact.

It was also held under paragraph 453, which provides for musical instruments and parts thereof, that blocks of granadillo wood, rough turned and bored, and intended for use in the manufacture of clarinets, were not parts of musical instruments.

In Anheuser-Busch Brewing Association vs. United States, 207 U. S., 556, Justice McKenna says:

"There must be transformation, a new and different article must emerge, 'having a distinctive name, character and use.'"

In Robertson vs. Gerdan, 132 U. S. 454, the question was whether pieces of ivory, for the keys of pianos and organs were musical instruments. Justice Blatchford says (p. 459):

"It is very clear to us that the fact that articles in question were 285 to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as a musical instrument."

In Worthington vs. Robbins, 139 U. S., 337, where the question was what duty should be imposed upon white hard enamel, imported for the making of watch dials, Justice Blatchford said that "before it can be applied to any practical use, its present form and condition must be changed by grinding or pulverizing and a new process of manufactured applied."

In the case at bar, when the plaintiff cut the shell lengths from the steel rounds, and subjected them to two forging processes, piercing and elongation, the shell body was not manufactured, but there was a partial manufacture thereof. Having only partially manufactured the shell body, can it be said that the plaintiff manufactured and sold a part of the shell? On no other theory can the tax be levied. The Act is limited in its scope. Many persons may do manufacturing work on projectiles, who are in no sense subject to the tax. The manufacturer who undertakes to make and deliver completed shell bodies, may divide his work among many manufacturers. Each of these would be engaged in manufacturing; the work of each

would constitute a stage in the development of the ultimate or completed projectiles. From this manufacturing work upon the projectiles, they might derive great profits, but they are not liable to be taxed under the provisions of the Act. It is only he who makes and sells the completed shell or part of a shell, who is made taxable under the Act.

There is, of course, some conflict of authority, particularly with reference to the tariff acts, as to the duty leviable on imported 286 articles manufactured or partially manufactured. I cannot stop in an attempt to reconcile all of these cases. Some apparent differences are due to the different wording of the Acts of Congress under which the duty is laid. Perhaps some confusion has arisen by a misapplication of the doctrine of "chief use," recognized by the Supreme Court in the case of *Magone vs. Wiederer*, 159 U. S., 355, and kindred cases. I find nothing in those cases which in any sense conflicts with the cases cited above. In *Magone vs. Wiederer*, the glass in question was a completely finished product, ready to be used in clocks. At the trial testimony had been introduced to show that the glass could be used for other purposes than as a part of a clock. The Supreme Court held that it was not necessary that the article should be exclusively used for the purpose named, that the real question was what was its chief or principal use. In none of those cases was there any question raised between a manufactured and a partially manufactured product.

That Congress did not intend to tax the raw material entering into the finished product, is conclusively shown by the fact that to the original section of the Act as introduced, was added a second section providing as follows:

"And every corporation selling or manufacturing for any corporation mentioned in paragraph (1), any material entering into and used as a component part in the manufacture of any of the articles enumerated in (a), (b), (c), (d), (e), or (f), shall pay for each taxable year an excise tax of five per cent upon its net profits actually received or accrued for said year, from the sale or 287 disposition of such material for entering into or used as a component part in the manufacture in the United States of the articles so enumerated as aforesaid. (p. 13491, Congressional Record for 1916)."

This sub-section was stricken from the Bill.

I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the completed things specifically designated in (b), (c), (d) and (e), and on those persons who were manufacturing and selling at a profit any completed part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the completed thing.

And finally, that any doubt as to the true meaning of this taxing Act, should be resolved against the Government and in favor of the citizen. The motion for a new trial is, therefore, refused.

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Judgment.

Now, March 1, 1919, judgment is hereby entered on the verdict in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, in the sum of two hundred and sixty-three thousand two hundred fifty-eight dollars and six cents (\$263,258.06).

J. WOOD CLARK,

Clerk.

289

Bill of Exceptions.

At the above number and term the Forged Steel Wheel Company, a corporation of the State of Pennsylvania, and having its principal office and place of business in the City of Pittsburgh, Pennsylvania, came into this Court and filed its statement of claim against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, defendant, and the said defendant filed his affidavit of defense to said statement; and thereupon issue was duly joined, and afterwards, to wit, at a session of this Court held on the 20th day of December, A. D. 1918, the said issue came on to be tried before Honorable William H. S. Thomson, District Judge, at which time appeared the plaintiff and defendant by their respective attorneys, whereupon the jury was sworn and the trial adjourned to January 2, A. D. 1919, at which time appeared the plaintiff and defendant by their respective attorneys, whereupon the witnesses whose names are set forth in the testimony—which testimony is made a part of this Bill of Exceptions—were called and duly sworn and testified as in said testimony set forth; and on the 3rd day of January, 1919, plaintiff's points and defendant's points were presented to the Court; and on the 3rd day of January, 1919, the Court gave binding instructions to the jury in favor of the plaintiff and against the defendant, to which counsel for the defendant excepted, which exception was duly noted and bill sealed; and on January 7,

1919, a motion for a new trial was filed by the defendant with 290 leave of Court, and said motion was argued before said Court

on January 25, 1919, and on the 1st day of March, 1919, the Court filed an opinion refusing motion for a new trial, whereupon the Clerk of his Court entered judgment March 1st, 1919, for the Forged Steel Wheel Company, plaintiff, against C. G. Lewellyn, Collector of Internal Revenue, in the sum of \$263,258.06.

Whereupon, on the 22nd day of March, 1919, the said defendant filed his petition for a Writ of Error and presented said petition with his Assignments of Error, and on the same day said writ was duly allowed and issued and a citation was thereupon issued and served on counsel for the plaintiff, and thereupon the aforesaid Judge did to

this Bill of Exceptions, in pursuance of the request of Plaintiff-in-Error, and of the law, put his seal this 22nd day of March, 1919.

W. H. S. THOMSON, [SEAL.]
*Judge for the United States District Court
for the Western District of Pennsylvania.*

The foregoing Bill of Exceptions presented to us and found correct.

GORDON & SMITH,
Attorneys for Plaintiff.

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Assignments of Error.

And now, March 22nd, 1919, comes the above named defendant by R. L. Crawford, United States Attorney for the Western District of Pennsylvania, and in connection with the petition for Writ of Error makes the following Assignments of Error:

First. The Court erred in overruling the following motion (page 162) :

"On behalf of the defendant, I wish to move that a non suit be granted in this case, for the reason that the plaintiff under the law and the evidence, has not established a cause of action."

Second. The Court erred in charging the jury as follows (page 166) :

"Looking at the Act of Congress, and interpreting it according to the words which Congress used, and which Congress is supposed to have used in their ordinary and usual signification, it seems clear to the Court that this is a tax imposed upon profits which are made by a manufacturer of shells, or parts of shells, and which completed shells or parts of shells the party or person sold or disposed of at a profit."

Third. The Court erred in charging the jury as follows (page 167) :

292 "And it is also entirely clear to my mind that the forging is not raw material, but is a partial manufacture of the shell casing, upon which two or three very important mechanical processes have been had, and which were steps in the completion of the shell casing. But this was not a part of a shell within the meaning of this Act of Congress."

Fourth. The Court erred in charging the jury as follows (page 168) :

"But, inasmuch as this plaintiff simply did certain forging work thereon, which constituted perhaps three out of thirty of the processes necessary to complete the shell casing, it could not be said in the eye of the law, that the company had manufactured a part of the shells."

Fifth. The Court erred in charging the jury as follows (page 169):

"Under all the evidence in the case, I instruct you to render a verdict in favor of the plaintiff for the sum of \$246,920.18, with interest from the 27th day of November, 1917, and the plaintiff's first point, that, 'Under the pleadings and evidence in this case, the verdict should be in favor of the plaintiff and against the defendant for the full amount of the tax paid, to wit, \$246,920.18, with interest at the rate of six per cent, per annum from the 27th day of November 1917,' is affirmed."

R. L. CRAWFORD,
*United States Attorney and
Attorney for the Plaintiff-
in-Error.*

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Notice Re Contents of Record.

Filed March 25, 1919.

J. Wood Clark, Clerk:

The parties in interest are hereby notified that defendant above—Plaintiff in Error, will in the record on appeal incorporate the following:

All matters specified and required by rule of the Circuit Court of Appeals for the Third Circuit.

B. B. McGINNIS,
Attorney for Plaintiff in Error.

March 25, 1919.

And now, to wit, March 25, 1919, service of the above accepted and objection waived, including requirement of five days' notice.

GORDON & SMITH,
Attorneys for Defendant in Error.

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Certificate.

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record of proceedings ordered to be printed in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court at Pittsburgh, this — day of April, 1919.

Clerk.

295 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2462. (List No. 45.)

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

v.

FORGED STEEL WHEEL COMPANY, Defendant in Error.

And afterwards, to wit, on the sixth day of May, 1919, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable Thomas G. Haight, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

296 And afterwards, to wit, on the ninth day of June, 1919, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

297 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2438.

CARBON STEEL COMPANY, Plaintiff in Error,

v.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

March Term, 1919.

No. 2465.

WORTH BROTHERS COMPANY, Plaintiff in Error,

v.

EPHRAIM LEDERER, Collector of Internal Revenue for the First District of Pennsylvania, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

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March Term, 1919.

No. 2462.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

v.

FORGED STEEL WHEEL COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

Opinion of the Court.

(Filed June 9, 1919.)

Before Buffington, Woolley and Haight, Circuit Judges.

BUFFINGTON, Circuit Judge:

These cases concern the construction and application of Section 301 of Title III of the Act of Congress of September 8, 1916, 39 St. 756, 780, which provides:

"That every person manufacturing projectiles, shells, * * * or (f) any part of the articles mentioned in (b), (c), (d), or (e) * * * shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

An examination of the whole act shows it imposes an excise tax on persons manufacturing either certain mentioned war munitions or appliances, or on persons manufacturing any part of any 299 of the said mentioned articles. Therefore, two questions naturally arise: First, who shall be deemed manufacturers of the mentioned articles, and second, who shall be deemed manufacturers of any part of the articles mentioned.

In ascertaining the true construction of the law and thus carrying out its purpose, this Court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the world war, great quantities of war munitions and war accessories had been manufactured in this country and sold to the Allied Governments at high and abnormal prices, owing to the fact that they were abnormal products and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation. That the tax was abnormal and its imposition temporary, was evidenced by the provision: "(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended."

In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. It will thus be seen that whatever may

have been the impelling motive of individual legislators, the 300 fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. And since all that were thus sent abroad were manufactured here, indeed the act is expressly directed to "such articles manufactured within the United States," and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject-matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured and to impose an

excise tax on the person who manufactured such articles or "any part of any of the articles mentioned," and to fix such tax by "the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the case, it follows that the pertinent subjects of inquiry where the act is to be applied is first to ascertain whether the war munitions or war accessories, were articles "manufactured within the United States;" second, if they were so manufactured within the United States, who manufactured such articles, and if so what were the "net profits actually received or accrued * * * from the sale or disposition of such articles;" third, if they were so manufactured within the United States, who manufactured any part of such article- and if so what were the "net profits actually received or accrued * * * from the sale or disposition of such articles."

In thus applying the broad, inclusive terms of the statute, "every person manufacturing * * * shells * * * or any part of any of the articles mentioned," along the lines of inquiry above indicated, it is clear that it must have been in the mind of Congress that complex questions would arise in specific cases and that these difficulties of specific application must be solved on some 301 general principles of the act. Turning to the act, we think

the broad purpose of Congress is clear to select as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So also the articles that in their completed, unitary form were adapted solely for war purposes might have parts which in and by themselves, could be also used and would naturally be used for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles or parts of articles, when sold in ordinary commerce, did not earn war profits, and second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gun powder, explosives, caps and the like, by the act providing that such of said articles as are "used for industrial purposes" are excepted. It would therefore seem that the broad general purpose was to include in the field of taxation, all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles.

Applying these general principles and lines of construction to the act, and in its application to the individual cases arising under it, let us turn to the facts of the three cases here involved, viz.:

Carbon Steel Company v. Lewellyn, Collector; Worth Brothers Company v. Lederer, Collector, and Llewellyn, Collector, 302 v. Forged Steel Wheel Company.

In the first case it appears the Carbon Steel Company made three substantially similar contracts with the British Government, whereby in one contract it agreed "to manufacture 75,000 4.5" shells Lyddite, * * * suitably packed for export and delivered free alongside steamer New York. * * * Inspection will be carried out at Contractor's works by an inspector or inspectors appointed by the Secretary of State."

In a second contract, the Steel Company contracted to sell, and the British Government to buy, 425,000 shells. The contract provided that in case of "the seller being able to manufacture from its present plants more than 425,000 of the said shells before June 30, 1916, the buyer will accept and pay for any such additional shells up to 175,000." Payment was to be made on "invoices and certificates of inspection, executed by an inspector of the buyer, certifying that such shells have been manufactured and have passed all factory inspection and shop tests with respect thereof. * * * It is understood and agreed that the buyer shall have the right of having one or more inspectors at each of the factories where the shells hereby contracted for, and their component parts, are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivered, and that the seller or its subcontractors, shall furnish all facilities required by such inspector for this purpose. The seller, at its expense, shall furnish all gauges, including master gauges, to be used in connection with the manufacture of the shells hereby contracted for, and their component parts, including all gauges required by the inspectors of the buyer."

303 The third contract was substantially of like import. From the contracts, it will be seen that the general purpose of the Carbon Steel Company was to make, or have made—and making is manufacturing—and to deliver in the United States, shells contemplated by the act.

In carrying out the contracts, the shells were made in the United States; they were accepted by the British Government, and the contract price was paid therefor by the Government to the Steel Company, and, as a result, there accrued to the Steel Company "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." Such being the fact, it would seem the case falls within the general scope of the act unless the Steel Company can show that in the manufacture of the shells it contracted to have manufactured, it did not manufacture the shell as a whole or any part hereof. Is such the fact?

Now, what was done in this case was this: The making of a shell consisted of nine operations, as follows:

- "(1) Obtaining suitable steel in bar form.
- "(2) Cutting or breaking said steel bars to proper length.
- "(3) Converting said cut bars or slugs into a hollow shell forging by means of a hydraulic press.

- "(4) The turning of said shell upon a lathe to exact dimensions.
- "(5) Closing in one end of said forging to form the nose of the shell.
- "(6) Drilling out the case of said shell and the inserting of a base plate.
- "(7) Threading of the nose of the shell and the insertion of the nose bushing, and the insertion in said nose bushing of a wooden plug to protect the thread thereof.

304 "(8) Cutting a groove around the circumference of said shell and the insertion therein of a copper driving band and the turning of said band to required dimensions.

"(9) Varnishing, greasing and crating of the completed shell."

But when all is said and done, it is clear that the basic operation of shell manufacture was making steel of certain characteristics, for all later steps depended on the composition and characteristics of the steel made in this initial step. This foundation step the Steel Company effected in its own plant, and the relative importance of this first step, compared with the remaining eight, is shown by the fact that the bare material and running expenses involved in this step amounted to somewhat over two millions of dollars as compared with some four millions three hundred thousand paid to sub-contractors as their expenditures for work, material and profits in the other eight steps. The steel thus made in the first step, was the property of the Steel Company, it remained its property while the sub-contractors completed the other eight steps, that was finally transferred by the Steel Company to the British Government. Moreover, during such eight steps every operation of these sub-contractors on the original steel was followed up by employees of the Steel Company, who checked the work as it progressed, and by virtue of the contracts to which we have referred, it was subjected to the inspection of the British Government provided for in the contract. It will thus appear that every step involved in the manufacture of the shell, from the raw product to the finished shell, was either done by the Steel Company itself or by those whom it hired to do some part thereof, and that the original steel base never passed out of the control and direction and ownership of the Carbon Steel Company.

305 To us it is clear that if the law here involved were a draft or conscription law, and that from its operation there was exempted from draft "every person manufacturing * * * shells * * * or any part of the articles mentioned," that all the workmen of the Steel Company engaged in making shells here involved would fall within said exception because they—and therefore the company—were manufacturing shells. We therefore conclude that by virtue of the Steel Company's own work in the first step and by virtue of its effecting and controlling the other eight steps through its sub-agents, the Steel Company was manufacturing

shells, and therefore subject to the tax imposed by this statute. It follows that the judgment of the Court below, which was that the Steel Company could not recover from the Government the tax it had paid, must be affirmed.

In the case of Worth Brothers Company v. Lederer, Collector, coming from the Eastern District of Pennsylvania, the pertinent facts are: The Midvale Steel Company and Worth Brothers Company are correlated to each other in that both companies are owned by the Midvale Steel and Ordnance Company. The Midvale Steel Company contracted with the French Government to sell and delivered about 400,000 high explosive shells to be made under accompanying specifications and under inspection of the Government as the work progressed. The said company was equipped to completely manufacture shells and in fact did, at its own plants so completely manufacture large quantities of the shells thus contracted for. Later it contracted with Worth Brothers Company to furnish the steel and complete six of the initial processes of the shell making which six steps constituted about forty per cent. of the cost of the shells. Thereafter the remaining twenty-nine steps of the 306 shell-making process, and which constituted sixty per cent. of the cost, was done by the Midvale Steel Company itself. Did the work thus done by the Worth Brothers Company on these six initial steps bring it within the provisions of the act as being a "person manufacturing * * * shells * * * or any part of any of the articles mentioned"?

Turning to the facts we note that the six stages of shell manufacture done by Worth Brothers Company were, as found by the Court below:

"(1) Smelting the ore in the blast furnace into pig iron without, however, running it into the moulds which would form what are commercially known as pigs.

"(2) In its molten state transferring it with a ladle into an open hearth furnace where it was converted into steel and tapped out of the furnace and conveyed into moulds in the form of ingots.

"(3) Heating the steel ingot to the proper temperature for rolling when it was rolled in the blooming mill into rounds or blooms.

"(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter and weight to produce the required shell forging. At this point the French inspectors inspected each individual billet to determine whether there were defects in the steel such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced and approximately one-third of its length.

"(5) The billet was then taken to the forge shop, heated, from two to three hours in a continuous furnace, and placed in the con-

307 tainer or die of a hydraulic piercing press. It was pierced while hot by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal being heated to about 2100 degrees is viscous so that the metal is pushed up to the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

"(6) The forging was then taken to a horizontal hydraulic bench and drawn while the metal was hot, so as to increase its length and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company."

It will, of course, be noted that all six steps were progressive advances toward the chemical constituents, the shape and the dimension required by, and essential to, the manufacture of shells in compliance with the contract. And while, in the first three steps, the work was of such a character that the product made thereby could, up to the fourth stage, have been diverted to general commercial needs, yet as noted, the work done in said three steps was actually done with a view to contract needs and shell requirements. With the fourth step, the contract shell inspection of the French Government began and in the fifth step the fluid metal was taken, from the possibility of use for general commercial purposes, by a hollow-cylindrical forging process which restricted the steel to the field of use for shells. By the sixth step, this hollow-cylindrical forging was drawn to a length, and to an inside and outside diameter which enabled the Midvale Steel Company to thereafter carry forward its twenty-nine progressive steps which, with the six of the Worth

308 Brothers Company, were required by the contract to complete the manufactured shell of the contract. From this it will be seen the Worth Brothers Company selected the material required in the shell; it made the steel which constituted the shell; by work done upon said steel, it segregated it from the general field of commercial use and limited it to use for shell-making. That some of that material when imperfect, was scrapped and used for other mechanical purposes only tends the more strongly to show that the work done by the Worth Brothers Company, in accordance with the contract, was shell work distinctively, for even where it failed by not being up to contract requirements, it was so far removed from the general field of commerce that it was sold, not as an ordinary commercial product, but as scrap, and its subsequent use was only such restricted use for minor objects as scrap heaps permit. It would therefore seem clear that the volume of work done by the Worth Brothers Company—forty per cent. of the cost—and the character of that work—segregating the steel from the general field of commercial use and narrowing it to shell use—made its work such as was aptly described by the act as being "manufacturing * * * shells * * * of any kind, loaded or unloaded * * * or any part" of a shell. Indeed, to say that when Worth Brothers Company made the steel which constituted the shell and when by pressing a cavity in the steel they made an outer rim or

shell which gave it such shape as committed and restricted it to shell use, to say that Worth Brothers Company when they were doing this abnormal work and earning abnormal profits thereby, were making those profits neither from manufacturing shells or manufacturing any part of shells, is to lose sight of substance and of the purpose of Congress in using the plain, broad, inclusive words of this statute. The statute shows on its face that Congress 309 contemplated that cases would arise where parts of the articles named would, if not indeed must, be made by joint co-operation. Indeed the found facts in this case show that not more than two or three plants in the whole country were equipped to make a complete shell. Shell making in this country had been going on for the two preceding years. It was well known that the shells made for the Allies in the United States were manufactured by the joint work of different plants. In the light of these facts, it would seem that a construction of the act which narrowed its application to the case of a plant that did the entire work, would defeat the whole purpose of Congress which presumably was to subject the profits of all engaged in the manufacture of shells or any part thereof, to this excise tax. Such being the case, we hold the tax imposed on Worth Brothers Company was justly laid and the judgment of the Court below which held the company could not recover the tax from the Government was right and should be affirmed.

We next turn to the case of the Forged Steel Wheel Company against Lewelyn, Collector. From the proofs it appears the British Government made contracts with certain persons whereby the latter agreed to supply it with high explosive shells in compliance with the specifications, requirement and inspection of the said Government. To fulfill such shell contract the contractor made sub-contracts with the Forged Steel Wheel Company, by which the latter agreed to manufacture and furnish to said contractor, rough steel forgings of the character provided in the contract, as to chemical constituents, tensile strength, size, shape, etc. To fulfill its contract, the Forged Steel Wheel Company either made, had made or bought in the market, the grade of steel required. This steel was 310 of a common commercial type known as rounds. These rounds it nicked and broke into eighteen-inch lengths, which it then heated and put through two forging processes, by the first of which a hole was pierced from one end of the round to within two inches of the other; by the second, the round was lengthened by drawing it through three successive rings of a hydraulic press. The output of the Forged Steel Wheel Company's work was a hollow steel body or shell form, of suitable composition, shape and length, from which to make, to the British Government standards, the high explosive projectiles contracted for. The weight of such shell forms was about one hundred and seventy pounds. To make this shell form suitable for use as a shell, the contractor to whom the Forged Steel Wheel Company then delivered it, was required to dress, bore and machine it down to seventy-seven pounds, this required some twenty-seven distinct and separate processes. Such be-

ing the facts, did the work of the Forged Steel Wheel Company noted above make it "a person manufacturing * * * shells * * * or any part of" a shell? The Court below held it did not, and such holding constitutes the question involved in this case.

In reaching that conclusion, the lower Court construed the act as though it read "a person manufacturing * * * shells * * * or any component, completed, part of" a shell, in that regard saying: "I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the completed things specifically designated in (b), (c), (d), and (e), and on those persons who were manufacturing and selling at a profit any completed part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the completed thing."

311 The Court was also influenced, first, by the fact that, as stated in its opinion, "The completed shell is a composite structure, consisting of six different parts: First, the shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration. Second, a copper driving band near the base of the shell body projecting slightly so as to engage the rifling of the gun. This gives the shell its rotary motion necessary for precision in flight. Third, a base plate inserted into the bed of the shell to prevent premature discharge. Fourth, a nose bushing of two parts, one of which screws into the shell body and the other into the fuse. Fifth, the fuse, either time or percussion, a highly complicated piece of mechanism screwed into the nose bushing. Sixth, the high explosive charge. These several parts or pieces of mechanism, each delicately constructed and designed not only individually but with reference to each other, when assembled together, constitute a high explosive shell."

Starting with the unquestioned premise that a completed shell was made up of assembling six separate and complete parts, the Court assumed that the purpose of Congress was not to tax anyone but (a) the manufacturer of a completed shell, or (b) the maker of a completed part of a shell; and that because the shell form the Forged Steel Wheel Company made was not a completed part of a shell, that it was therefore not subject to the excise tax imposed by the statute.

Now, it is manifest that standing alone the statute neither expresses nor implies any warrant or implication for limiting the broad, inclusive, generic words "any part" to the restricted, 312 specific, qualified term "any completed part." It follows,

therefore, that ground for inferring such intent in the mind of Congress must arise from something apart from the language of the act itself. Such intent the Court below found in certain decisions of the Federal Courts involving tariff laws which exempted from duty "manufactured" articles. And these decisions holding what were "manufactured" articles in tariff legislation the Court be-

low held Congress must have had in mind in passing this excise law saying, "We must assume that Congress well knew the distinction between a completely manufactured thing, or part of a thing, and a partial manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture."

On the other hand, in the Worth Brothers Company case, decided above, the Court below held these tariff decisions did not affect the construction of this statute, saying: "The rule has been applied in the classification of articles of merchandise imported and subject to customs duties or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material and what constitutes a wholly manufactured article dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed. I cannot perceive that these cases have any bearing upon the question arising in this case unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to completion shells or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is through taxation 313 of the business or occupation of manufacturing munitions of war to reach the profits of all those engaged in such manufacture whether engaged in manufacturing to completion or engaged in any part of such manufacturing."

We are of opinion the latter Court was right in so regarding these customs decisions, for when the objects which Congress had in view in framing the Customs Acts and this excise law, are considered, it will be seen they are wholly different. In customs law- the primary object of Congress in their passage was to protect domestic against foreign labor, and to effectuate this object the customs duties were so imposed that where all the work necessary to be done upon the imported article to fit it for use in the United States had been done abroad, such article or the part so completed and fitted for use, was, to carry out that primary intent, held to be a manufactured article, or a manufactured part, and therefore subjected to the duty. On the other hand, if work upon the imported article, or imported part, before it was fit for use remained to be done in this country, such article or part was held not to be a manufactured article within the scope of the law, and therefore not subject to the tariff duty. The necessity of bearing this primary purpose in view in construing Customs Acts was set forth in Tide Water Oil Company v. United States, 171 U. S. 216, where the Supreme Court, referring to a customs act, said: "The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries.

314 In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind." Indeed, it is, on the one hand, this presence of work already done which has fitted an object for use, or it is on the other hand, a residue of work necessary to fit the object for use, which brings the article within or without the description of the manufactured article of the tariff law. This is well summarized in *Tide Water Oil Company v. United States*, 171 U. S. 216, where it is said: "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name. The material of which each manufacture is formed, and to which reference is made in section 3019, is not necessarily the original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming material of the next rank."

From these decisions it will be seen that these tariff laws deal with manufactured articles, from the standpoint of protecting domestic labor, and the imposition of import duties is an incident in effectuating that main purpose.

315 But in the excise law in question, Congress is dealing with the imposing of taxes as the main object and with the work done as a mere incident to aid in determining the tax. In that aspect the quantum of the work done is immaterial.

Indeed, from a study of customs decisions, it will be seen that from the basic standpoint of protecting domestic labor, the imposition of import duties is a mere incident or means to effectuating such main purpose, and the term "manufactured article" must therefore be construed and applied with such purpose in view. It follows, therefore, that in such case the quantum of labor done or left to be done, is all-important in the practical administration of customs laws. On the other hand, the whole purpose of excise law is to produce revenue and it is the fact of manufacture and not the quantum of labor that is the determining factor. Indeed, the object of the statute, viz., the raising of revenue, may be reached where a minimum of labor is used in manufacturing taxed, for as the net profit is the basis of taxation, it follows that the smaller the relative amount expended in physical labor in a manufacturing operation the greater may be the relative net profit which determines the tax. Moreover, it will be apparent that a manufacturing operation in which much labor has been used, may not involve any net profits while another involving much less labor may result in taxable net profits. It will therefore be apparent that in an excise tax on manufacturing meas-

ured by net profits, the crucial question is not the quantum of the manufacture measured by steps but the fact of manufacture resulting in profits. Gauging the operations of the Forged Steel Wheel Company by this standard, it would seem clear that in doing the basic shell work it did that company was, in the broad and general sense of fulfilling this contract, a "person manufacturing * * * shells * * *," and by virtue of the particular manufacturing 316 stages it completed in the making of such shells, the company fell within the class of a "person manufacturing * * * any part of any of the articles mentioned." Such being the case, the excise tax was lawfully laid on the "net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States." It follows, therefore, the judgment recovered by it below was erroneous and must be reversed.

317

Order Affirming Judgment.

In the United States Circuit Court of Appeals for the Third Circuit.
March Term, 1919. No. 2462. (List No. 45.)

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Plaintiff in Error,

v.

FORGED STEEL WHEEL COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Order Affirming Judgment.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed.

JOS. BUFFINGTON,
Circuit Judge.

Philadelphia, June 9, 1919.

(Endorsed: 2465. Order Affirming Judgment. Received & Filed June 9—1919. Saunders Lewis, Jr., Clerk.)

318

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial District, &c.:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this court in the case of C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, plaintiff in error, v. Forged Steel Wheel Company, defendant in error, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 24th day of July in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

319 UNITED STATES OF AMERICA, &c.:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, is plaintiff in error, and Forged Steel Wheel Company is defendant in error, No. 2462, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the

320 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act theron as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

321

[Endorsed.]

2462.

File No. 27,281.

Supreme Court of the United States.

No. 526, October Term, 1919.

Forged Steel Wheel Company,

vs.

C. G. Lewellyn, Collector of Internal Revenue etc.

Writ of Certiorari.

Received Nov. 3, 1919. Saunders Lewis, Jr., Clerk.

322 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1919.

No. 2462.

FORGED STEEL WHEEL COMPANY, Plaintiff in Error,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed between counsel for the respective parties, that the certified transcript of the record in the above entitled cause which was used upon application for a writ of certiorari, and is now on file in the Clerk's office of the Supreme Court of the United States, may be taken as the return to the writ of certiorari heretofore granted, with the same force and effect in every particular as though the record and proceedings had been certified and sent up as a return to the writ. This stipulation shall be filed with the Clerk of the Circuit Court of Appeals for the Third Circuit, and a certified copy thereof sent by him to the Supreme Court as his return.

It is further agreed that the said certified transcript of the record now on file is full and complete.

WILLIAM L. FRIERSON,
Assistant Attorney General of the United States,
Attorney for Plaintiff in Error.
 GEO. SUTHERLAND,
 GEORGE B. GORDON,
 WILLIAM WATSON SMITH,
Attorneys for Defendant in Error.

Endorsements.

2462.

Stipulation of Counsel for Return to Writ of Certiorari.

Received & Filed Nov. 3, 1919.

Saunders Lewis, Jr., Clerk.

323 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Stipulation of Counsel for Return to Writ of Certiorari in the case of: Forged Steel Wheel Company, Plaintiff in Error, vs. C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this third day of November in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

324

[Endorsed.]

File No. 27,281.

Supreme Court U. S.

October Term, 1919.

Term No. 526.

Forged Steel Wheel Company, Petitioner,
 vs.

C. G. Lewellyn, Collector of Internal Revenue etc. •

Writ of Certiorari and Return.

Filed November 4, 1919.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, }
Petitioner,
v.
C. G. LEWELLYN, COLLECTOR OF INTERNAL Revenue for the Twenty-third }
District of Pennsylvania. } No. 526.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION OF RESPONDENT TO ADVANCE.

Comes now the Solicitor General on behalf of respondent herein and respectfully moves the advancement of the above-entitled cause for hearing during the present term.

Petitioner brought suit in the District Court to secure the refund of certain taxes levied upon it under the provisions of section 301 of the Act of Congress approved September 8, 1916 (39 Stat. 780, 781), known as the Munitions Manufacturer's Tax Act, which taxes were paid under protest. Said section provided, among other things, that persons

manufacturing "shells" or "any part" thereof should pay an excise tax of 12½ per cent upon the net profits derived during the taxable year from the sale or disposition of such articles manufactured within the United States. Petitioner was under contract with certain corporations, both in this country and abroad, to manufacture certain rough steel forgings for shells. The question arises whether it was a manufacturer of "shells" or "any part" thereof within the meaning of the Act. Judgment was rendered in the District Court in favor of petitioner, which was reversed on appeal to the Circuit Court of Appeals.

Numerous claims, aggregating several millions of dollars, for the refund of taxes imposed under said section 301 are now pending in the Federal Courts and before the Commissioner of Internal Revenue. Several of the District Courts of the United States have construed said section and conflicting decisions have resulted. It is important, therefore, that this case be set for early argument.

Opposing counsel concur and join in the request for the advancement of this cause.

ALEX. C. KING,
Solicitor General.

NOVEMBER, 1919.



Office Supreme Court, U.
FILED
SEP 2 1919
JAMES D. MANNER
CLERK

No. 526

IN THE
Supreme Court of the United States

No.

OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, Petitioner,

vs.

**C. G. LEWELLYN, Collector of Internal Revenue for the
Twenty-third District of Pennsylvania, Respondent.**

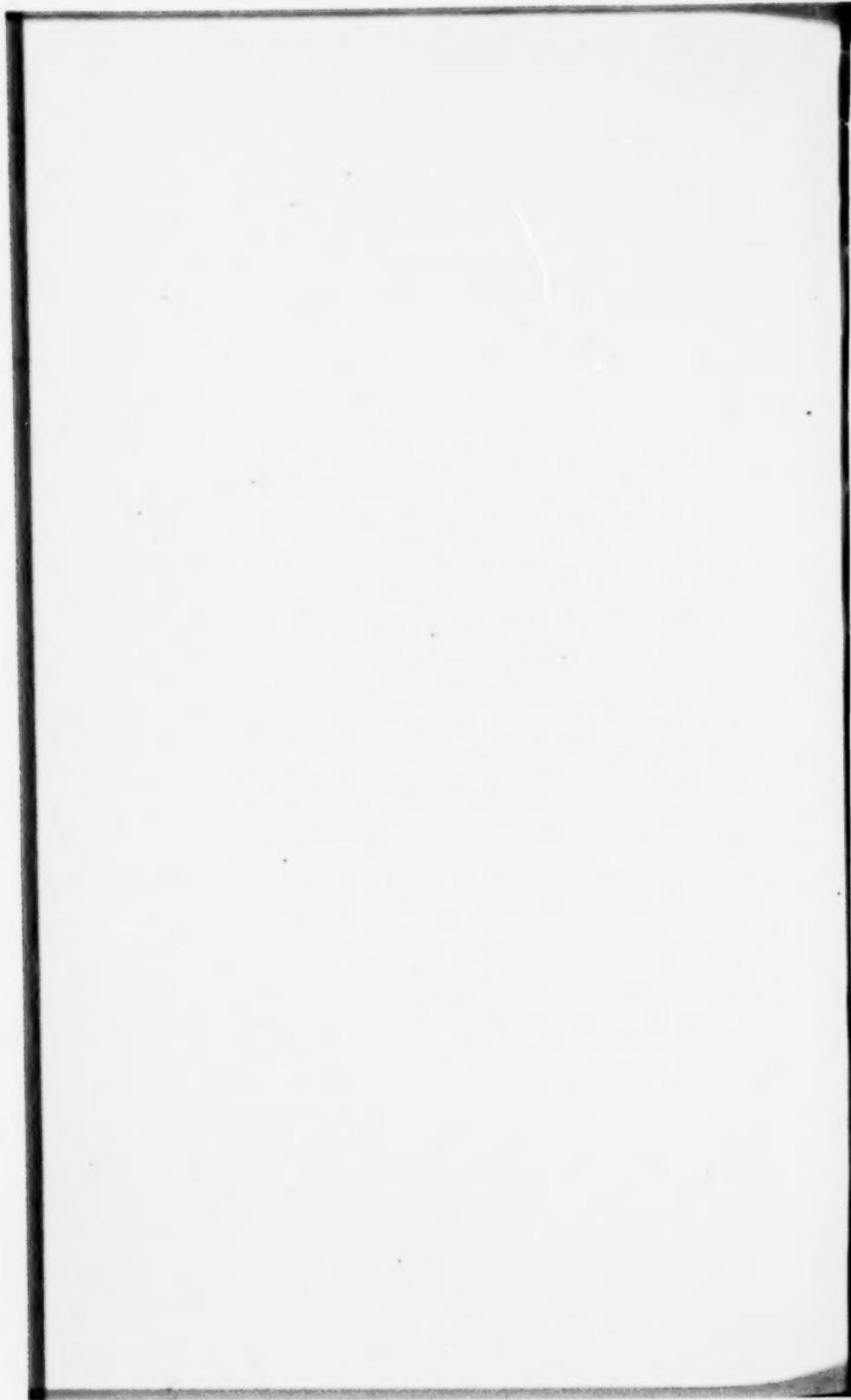
**Petition of Forged Steel Wheel Company
for Writ of Certiorari to the United
States Circuit Court of Appeals
for the Third Circuit
AND
Brief in Support of Petition.**

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IN THE
Supreme Court of the United States

No.

OCTOBER TERM, 1918.

FORGED STEEL WHEEL COMPANY, Petitioner,

vs.

**C. G. LEWELLYN, Collector of Internal Revenue for the
Twenty-third District of Pennsylvania, Respondent.**

**Petition of Forged Steel Wheel Company
for Writ of Certiorari to the United
States Circuit Court of Appeals for
the Third Circuit.**

*To the Honorable, the Justices of the Supreme Court
of the United States:*

Your petitioner respectfully shows:

On June 29th, 1918, the petitioner brought an action at law in the District Court of the United States for the Western District of Pennsylvania, against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, to recover \$246,920.18, the amount of certain excise taxes exacted from the

petitioner and paid by it under protest. Said excise taxes had been assessed under Section 301 of Title III of the Act of Congress of September 8th, 1916 (39 St. 756-781).

This portion of the Act of Congress is generally known as the "Munition Manufacturers" Tax Act, although it does not tax all munitions and does tax things which are not munitions. It imposes upon every manufacturer a tax of 12½% upon the net profits received or accrued from the sale or disposition of projectiles and certain other specified articles manufactured by him, or any part of any of said articles.

The petitioner, the Forged Steel Wheel Company, is a manufacturing corporation. Its plant is in Butler County, Pennsylvania, and it is engaged in the manufacture of steel by what is known as the "open-hearth" process. It makes no finished products except car wheels. The steel made by it is sold in various shapes to suit the requirements of manufacturers—sometimes in ingots, but more frequently in plates, billets, rolled shapes and forgings.

During the year 1916 the petitioner had contracts with various projectile manufacturers, some located in the United States and some located in England, for the manufacture and sale to them of rough steel forgings. Projectile manufacturers, as a rule, are not steel manufacturers, although steel is the chief component of the projectile. It is in the shape of rough steel forgings that projectile manufacturers customarily purchase their steel.

Petitioner had made a return and paid the tax on the profit made by it in forging steel, although, under our construction of the act, no tax was due. An additional assessment was levied by the Collector upon the profit made by petitioner in manufacturing steel before the forging process began and on steel purchased by petitioner and forged by others, and it was for the recovery of this second assessment that this suit was brought.

The principal question in this case was whether the profit made by the petitioner in the manufacture of the steel which it sold to projectile manufacturers was subject to the tax imposed by Section 301. The fundamental point in the decision of this question depended upon whether the rough steel forgings which petitioner manufactured and sold, and which was ultimately manufactured into shell bodies, were projectiles or parts of projectiles within the meaning of the Act.

The British high explosive projectile, in the manufacture of which the steel furnished by the petitioner was used, is a composite structure composed of six principal parts:

1. A shell body.
2. A copper driving band.
3. A base plate.
4. A nose bushing.
5. A fuse.
6. The high explosive content.

Each of these parts is made separately (in fact, the fuse is made of some seventy-five different pieces) and

the six parts are finally assembled together to make a complete projectile or shell and each part has to be complete in itself in order to be so assembled.

The case was tried in the United States District Court for the Western District of Pennsylvania at Pittsburgh before Judge W. H. S. Thomson and a jury, and resulted in a verdict being rendered on January 3rd, 1919, by the jury in favor of petitioner and against the Collector in the sum of \$263,258.06, which was the full amount of the tax collected, plus interest from the time of payment to the date of the verdict. This verdict was rendered by the jury under instructions of the Court, the judge ruling that under the undisputed evidence in the case, the tax was unlawfully imposed because the profits upon which it was based were not made from "the sale or disposition of projectiles or parts of projectiles."

Judge Thomson's construction of the statute was that a projectile in order to be taxable must be substantially complete and that the various parts of the projectile must in like manner be substantially complete, and that the rough steel forgings which were made by the plaintiff were neither projectiles nor parts of projectiles within the meaning of the Act, since they could not be used as such without putting them through additional manufacturing processes. In fact, the extent of such subsequent manufacturing processes was in value as $11\frac{1}{2}$ is to 2.

Judge Thomson's opinion, sur motion for a new trial made by the Collector speaks for itself. It is

amply supported by authority as to the meaning of the words "manufacture" and "part" and will be found on page 275 of the printed record of the United States Circuit Court of Appeals.

After the motion for a new trial had been overruled, judgment was entered against the Collector. The Collector thereupon prosecuted an appeal to the Circuit Court of Appeals for the Third Circuit. On the 9th day of June, 1919, the Circuit Court of Appeals reversed the District Court.

The opinion of Judge Buffington in the Circuit Court of Appeals will be found in the printed copy of the record submitted herewith, beginning at page 297—the portion of the opinion which refers to this particular case begins on page 309. The opinion covers three cases that were decided by the Circuit Court of Appeals at the same time—the *Carbon Steel Co. vs. Lewellyn*, *Worth Brothers Company vs. Lederer*, and your petitioner's case, the *Forged Steel Wheel Company vs. Lewellyn*. The basic proposition in the opinion of the Circuit Court of Appeals is that Congress intended to tax any person who took any part in the manufacture of projectiles beyond the mere manufacturing of raw steel; and that any person who carried the fabrication of steel to a point where it became segregated from the general field of commercial use and was limited to use in the subsequent manufacture of shells was taxable.

Therefore:

**THE FUNDAMENTAL QUESTION INVOLVED IN
THIS CASE IS:**

Whether a manufacturer of rough steel forgings was liable to the tax imposed by Section 301, where he sold the forgings to another manufacturer located in the United States or in England, and where the rough steel forgings were intended to be subsequently manufactured into a part of a projectile, to wit, a shell body.

And all this under circumstances where the cost of the fabrication of the rough steel forging into a shell body was \$11.50 as compared with \$8.50, the value of the rough forging, which last item was itself made up of \$6, value of raw steel, and \$2.50, value of fabricating it into a rough forging.

As the facts were entirely undisputed, it presented a pure question of law, to wit, the meaning of the language used by Congress in Section 301, which is as follows:

“SEC. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or sub-

mersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: Provided, however, That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."

It is submitted that a writ of *certiorari* should be granted in this case for the following

REASONS:

1. The question presented is purely one of law, involving the construction of Title III, of a revenue act which has never been before this Court.
2. The question is of great public importance and of serious concern to a large number of persons throughout the country, the amount of whose tax obligations depends upon the correct construction of the act; and it is also of great importance to the government to know authoritatively and finally through one decision broadly operative how far it may go in collecting taxes under the section of the act in question and to what extent, if

at all, it must provide for a refund of taxes already levied and paid under protest.

3. The decision of the Circuit Court of Appeals in the Third Circuit is not authoritative and binding but only persuasive upon courts in other circuits where this question will surely arise. The question is now pending in the Sixth Circuit in two cases in the District Court of the United States for the Southern District of Ohio, Western Division, and is sure to arise in the Eighth Circuit with reference to two applications for refund, upon which suit has not yet been brought against the collector, but which soon will be brought in the City of St. Louis.

4. The amount involved in the determination of the question is very large, but it is not possible for petitioner to advise this court as to the approximate amount, since an inquiry addressed by petitioner's counsel to counsel for the government developed the fact that the department of internal revenue does not keep its records in such shape as to enable it to give the desired information. It is known, however, to petitioner's counsel that there are pending either in the courts or before the commissioner of internal revenue claims relating to projectiles alone which amount to \$4,762,929.08, a schedule of which is attached as an appendix to the brief submitted herewith. We think it is fair to assume that Section 301 not only with reference to projectiles, but with reference to the manufacture of other articles which are specified therein which are not known to petitioner's counsel. While it is true that this statute has

been repealed, the large amount of money involved and the large number of cases still undetermined are urgent reasons for an authoritative ruling upon the meaning of the act. The exercise of this court's jurisdiction in favor of granting a writ would be in accordance with such cases as *Von Baumbach vs. Sargent Land Co.*, 242 U. S., 503, and *Lynch vs. Turrish*, 247 U. S., 221. In those cases this court reviewed on *certiorari* certain judgments obtained by the government against defendants under the Corporation Tax Law of 1909 and the Income Tax Law of 1913, respectively, although both of those acts had been repealed or superseded by other acts when the Supreme Court took jurisdiction. We understand that the taking of jurisdiction in those cases was for the purpose of having a final construction given to certain aspects of those statutes when the interests of a large number of persons were involved and litigations and claims of an indefinite number were affected.

5. While there is at present no direct conflict between decisions of different courts of appeal as to the proper construction and application of this statute, it is submitted that the determination in the instant case, depending as it does upon the meaning of certain words used in the statute, is in conflict with the prior uniform holdings of the Federal Courts construing these same words in other revenue acts.

The important words in the section of the act for construction are "any part of any of the articles mentioned" and "any person manufacturing," as applied to the subject matter. The meaning of the words "part or parts" of a composite structure has been established by the Federal Courts as signifying a sub-

stantially finished part as related to the whole structure and to the purpose it is intended to subserve.

The meaning of the words "manufactured article" has also been definitely adjudged by the Federal Courts as implying that the processes of manufacture have been so far completed as to render the article ready for use without additional processes of manufacture, and that short of the carrying of any article to the stage of practical completion, the work upon it is nothing but a partial manufacture, and the person performing the work upon it is not a person manufacturing it. In other words, the prior processes of manufacture are nothing but the preparation of material, the manufacture of one person becoming the raw material used by another.

6. The decision of the Circuit Court of Appeals is directly in the face of the authorities establishing the above propositions as cited in our brief, and the refusal of the court below to follow the precedents, on the ground that the precedents were established in customs-duty cases and that the protection of domestic industry was the moving reason for the prior decisions on the point, is without warrant.

As shown in our brief, one of the most authoritative decisions was a case arising under the Act of 1824 when the doctrine of a tariff for revenue as distinguished from a tariff for protection prevailed in our legislation. We also show that the distinction between the manufacture of a part and a partial manufacture

has been definitely established or recognized by this court in such cases as the *Sugar Bounty cases* and by the Federal Courts in insolvency cases, in which customs and tariff theories have no place in determining the meaning of the statutory words involved.

7. The decision of the Circuit Court of Appeals is directly against the well established rule of construction that a tax is never imposed upon a citizen when the question of his liability is doubtful.

8. The section of the act was considered by the Circuit Court of Appeals merely in its application to shell forgings. The section also taxes profits derived from the sale of other articles or parts thereof among which are: torpedoes, fire arms, cannon, machine guns, rifles, bayonets, electric motor boats and submersible vessels. Those citizens who supplied material entering into the above various articles are no less vitally interested than is the petitioner in the soundness of the court's construction of the statute, resting, as it was made by the Circuit Court of Appeals to rest, on the supposed purpose or intent of the act.

9. The section of the act has a very wide and quite sufficient application without it being necessary to extend its scope in the way the lower court did. In the accompanying brief there is printed a list of definite parts of various kinds, of the articles specified, which are commonly recognized as parts for assembling or for sale purposes, and manufactured and known to the trade as such. The act would therefore have a very definite and at the same time wide application to well

recognized parts of the articles mentioned without extending the meaning of the word "part" as the court has done.

10. The court below failed to differentiate this case from the other two cases which it decided at the same time, to wit, the *Carbon Steel Co. vs. Lewellyn and Worth Bros. Co. vs. Lederer*. In petitioner's case, the tax on the forging profit had already been paid. The tax which petitioner paid, which was involved in this case and for which it recovered judgment against the collector in the court below, covered two items of profit only:

- (a) The profit in manufacturing steel in its own furnaces; and
- (b) The profit in the sale of steel purchased from the Illinois Steel Company.

The tax involved in this case is a tax upon a purely steel manufacturer's profit in making the raw materials, and a middleman's profit where it purchased the steel. We are therefore absolutely accurate in stating that the government had already been paid the tax on the profits in all the fabricating processes by which the steel was segregated from the general field of commerce and made fit only for sale to a projectile manufacturer. The two hundred forty-odd thousand dollars of tax in this case to the extent to which it is levied upon anything that was ever in our shop is purely a tax levied upon the steel manufacturer's profit. If we had sold this steel to somebody else instead of turning it into shell forgings, no one would have thought of contending that we were liable for tax. This shows the inequitable results

of the construction placed on the act by the court below. Under that construction, insofar as we bought steel from the Illinois Steel Company, that company did not have to pay any tax on its profits, but where we made the steel ourselves, we did have to pay a tax on the profit.

Wherefore the foregoing matters being considered, your petitioner prays that the court will grant its writ of *certiorari* directed to the United States Circuit Court of Appeals for the Third Circuit requiring that court to certify a full and true transcript of the record in the above entitled cause to this court for review and that this court will thereupon proceed to correct the errors complained of, reverse the judgment for the respondent and reinstate the judgment for the petitioner rendered in the District Court and remand the cause, and give your petitioner such other and further relief as the nature of the case may require and to the court may seem proper in the premises.

And your petitioner will ever pray.

FORGED STEEL WHEEL COMPANY,

By.....

GEORGE SUTHERLAND,

GEORGE B. GORDON,

WILLIAM WATSON SMITH,

JAMES MCKIRDY,

Attorneys for Petitioner.

Certificate.

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

.....
Attorney for Petitioner.

Brief in Support of Petition.

THE FUNDAMENTAL QUESTION INVOLVED.

The fundamental question for determination in this case is whether rough steel forgings, manufactured by the Forge Company in 1916 and sold and delivered by it to the Baldwin Locomotive Works and other persons, were projectiles or parts of projectiles within the meaning of Section 301 of Title III of the Act of Congress of September 8th, 1916, C. 463, 39 Stat., 781; U. S. Compiled Statutes, 1918, Compact Edition Sec. 6336-1/4 b., which levies what is sometimes called the Munition Manufacturers' Tax. Said Section 301 reads as follows:

"SEC. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kinds and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon

the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: *Provided, however, That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."*

It will be observed that every person who manufactures *a projectile or any part of a projectile* shall pay an excise tax of $12\frac{1}{2}\%$ upon the entire net profits actually received or accruing to it *from the sale of projectiles or parts of projectiles manufactured within the United States.*

The questions that have to be decided in this case are:

What was it that the Forge Company made and sold?

Was it a projectile?

Was it a part of a projectile?

SUMMARY OF POINTS.

Briefly summarized the points relied upon by the petitioner and hereafter presented more at length are as follows:

1. The thing which the petitioner made and sold was neither a projectile nor a part of a projectile, but

a rough steel forging out of which the purchaser manufactured by an elaborate process a shell body which then and only then became a part of a projectile. What petitioner therefore made and sold was not part of a projectile, but material out of which such part was made.

2. The tax is imposed by the statute upon certain specified articles, made up of distinct parts, and upon each of these parts separately. The product in question, not being a part of any such article, but only material from which a part is to be subsequently fabricated, is not subject to the tax.

3. The intent of Congress is to be derived through the meaning of the words used to express that intent, and that meaning when ascertained, not only determines the meaning of the statute, but the intent of Congress in enacting it.

4. The court below in its decision ignored this plain meaning as established by the uniform decisions of the Federal courts and of the Revenue Department, and based its construction wholly upon what it conceived to be the general purpose which Congress had in mind in passing the statute.

5. Revenue laws "are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business."

6. In every case of doubt such revenue statutes

are construed most strongly against the government and in favor of the subjects or citizens.

7. The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

8. Under the authorities a part of a thing means a substantially finished part.

9. The government's claim that the cases cited by us are not controlling because they are import duty cases, while this tax is not imposed on the article but on the business, is without merit. That there is no such distinction is shown by the cases hereafter cited wherein the definitions we contend for were applied to the sugar bounty law, to cases arising under bankruptcy and insolvency and other acts.

10. The act, when its essential words are given the interpretation for which we are contending has a natural application to a great number of commodities, and no necessity exists for extending the meaning of the words, by any doubtful construction, with a view to finding subjects for its operation.

11. If the construction put upon section 301 of the Act by the Circuit Court of Appeals were the true construction, the words "or any part of any of the articles mentioned in (b), (c), (d) or (e)" would be without any significance whatever in expressing the meaning of Congress.

12. The petitioner has already paid a tax on the profits made in the forging process of the article sold.

WHAT THE FORGE COMPANY MANUFACTURED

The Forge Company is a manufacturer of steel, and what it manufactured and sold was a rough steel forging, which was subsequently manufactured by another person into a part of a projectile known as a shell casing.

The Forge Company's manufacturing begins with the smelting of pig iron, scrap and other necessary ingredients in open hearth furnaces (Record, p. 82). After these materials have been converted into steel it is cast into ingots. The ingots are then rolled into billets, blooms, slabs, or rounds. The steel is sometimes sold in this condition. Sometimes the process is carried further by rolling them into small rounds, squares, angles, Z-bars, or other shapes, and sometimes they are pressed into forgings and the steel is sold in that shape (Record, p. 83). The Forge Company makes no finished articles of any kind except car wheels (Record, pp. 83-84).

In the year 1916 the Forge Company had contracts with various persons, some of them located within the United States, such as the Baldwin Locomotive Works, the American Brake Shoe & Foundry Company and the J. G. Brill Company, and some of them with persons abroad, such as the Kingdom of Great Britain and J. P. Hill & Company, by which it agreed to manufacture,

sell and deliver to them certain quantities of rough steel forgings, ordinarily denominated in the contracts as shell forgings, which were to comply with the specifications imposed by the British Government upon the manufacturer of high explosive projectiles. These specifications, in so far as they were applicable, were in turn imposed upon the manufacturer of the rough steel forgings supplied to such manufacturer; that is to say, as to the chemical constituents, strength, etc., of the steel, and as to the size, shape and freedom from mechanical defects of the rough forgings, so that they would pass British inspection as materials proper for use in the manufacture of high explosive shells.

The method of the manufacture of these forgings was to roll the ingots into what is known as steel rounds approximately 6.9 inches in diameter (Record, p. 84). There was nothing peculiar about the steel itself. It was the ordinary grade of steel such as could have been used for a hundred different purposes (Record, p. 133); neither was there anything out of the ordinary in its manufacture, or cost, or value.

The Forge Company took these steel rounds and put them in a lathe and nicked them, that is, cut circular grooves around them at a distance of 18 inches apart; then placed them under a hammer and broke them at the nicks into pieces so that each piece of steel was of the necessary diameter and length to contain at least the amount of metal required in each forging (Figure 1, Exhibit K; Exhibit N-1, between pp. 170 and 171 of Record). The piece was then heated and put through two forging operations in hydraulic

presses. The first was a pressing operation by which a hole was pierced in one end to a point within about two inches from the other end; the second was an operation by which the piece of steel thus pierced was elongated by drawing it through three successive rings in a hydraulic press, so that it left the steel in the shape of a cylinder open at one end and closed at the other. The piece of steel in this shape might be compared with an umbrella stand or straight flower pot, and contained about 170 pounds of steel (Record, p. 87).

A fair idea of it may be obtained from the Forge Company's Exhibits K and N-2, which are reproduced in the printed record between pages 170 and 171. It is interesting to contrast these with a finished shell body, Plaintiff's Exhibit N-5, to be found at the same place in the record. It was this rough steel shell forging, which was manufactured and sold by the Forge Company. And it was the profit made in the manufacture and sale of the steel contained in this forging, upon which the tax was assessed.

**THESE ROUGH STEEL FORGINGS ARE NOT
PROJECTILES OR SHELLS WITHIN THE
MEANING OF THE REVENUE ACT.**

Let us get a clear idea of what a high explosive projectile or shell is.

A high explosive projectile or shell (such for example as a six-inch shell) is a very carefully manufactured article, brought to a very high finish by the most careful machine work, so true to design as to admit of

no deviation; and is composed of many parts assembled together by mechanical processes.

One of these composite structures consists of the following distinct and essential parts:

1. The shell body in one piece.

2. A copper driving band set near the base of the shell body and projecting slightly beyond it to engage the rifling of the gun.

3. A base plate screwed or dove-tailed into the base of the shell to prevent premature discharge of the high explosive content.

4. A nose bushing.

5. A fuse screwed into the nose bushing, which is either time or percussion, or both.

6. High explosive charge or content.

As stated, the shell is a highly developed, carefully and accurately fabricated composite structure, every part of which, assembled together as a whole, is necessary to constitute it a shell; that is, to make it at all available as such.

The shell body is the largest and most substantial part in respect of size and weight. It is cylindrical in shape up to the head, where it is made pointed with what is called the ogival head. The point or ogival head is given to all modern projectiles. The reason for making it pointed is to decrease the air resistance in

the flight of the projectile and to increase its penetration when fired against armor.

The copper band is the second part. It is inserted in the body of the shell near the base in order to give the rotary motion necessary for precision in flight. The band has a diameter slightly greater than the caliber of the shell body. When fired the force of the explosion forces the band to conform to the lands and grooves of the rifling in the cannon. This not only assures proper rotation, but the soft band is thereby made to fill the entire cross section and, therefore, to act as a gas check which prevents the powder gases from escaping around and in front of the projectile. This copper rotating band is put on the shell by forcing it into an undercut groove, cut around the projectile near the base. Longitudinal or irregular grooves are made in the seat for the copper band to prevent its rotating separately from the projectile.

The base plate is either of lead and copper calked into an undercut groove at the base of the shell or of steel screwed into the base of the shell. Its purpose is to prevent the danger of premature explosion of the projectile in case there should be some piping or flaw in the metal base of the shell body.

The nose bushing is a machined piece made of two forgings, one of which screws into the shell body and the other into the time fuse.

The fuse is screwed into the nose of the shell. The fuse is a complicated piece of mechanism, composed

sometimes of as many as 75 pieces (Record, pp. 116-121). It may be a time fuse, a percussion fuse, or a combination of the two. The first kind of fuse will explode after the projectile has traveled for the number of yards to which it has been set by the gunner. A percussion fuse is one that will explode when the projectile strikes some solid matter. The combination fuse is a combination of these two kinds, and insures the explosion of the shell when it strikes or when it has traveled a certain designated distance, whichever happens first.

The high explosive content needs no description; but it is upon this beyond all else that the shell depends for its effectiveness.

Manifestly the projectile is not a projectile, unless it consists of all of these things. You could no more fire this 6.9-inch forging out of a six-inch cannon than you could fire a kitchen range out of it.

THESE ROUGH STEEL FORGINGS ARE NOT PARTS OF PROJECTILES.

Not only is the shell as a whole a delicately and highly finished composite piece of mechanism, but its several parts must also be delicately and highly finished as related to each other and to the whole structure, in order that they may be assembled together and in order likewise that when assembled the composite structure will serve its purpose as a shell. No one of the parts is of any use for firing purposes without the

other parts; and no one part can be associated or combined with the other parts, unless each part is at the time finished and complete with reference to its relation to the others in the finished shell structure. Thus, the shell body cannot be effectively fired without the copper band; nor would the shell body and the band together be a practical high explosive shell without the fuse and the high explosive content.

So also, the shell body could not have the copper rotating band or the base plate pressed into it with a view to making a complete practical shell, without carrying the shell body to a late stage of completion, and also preparing the shell body itself by elaborate machining and cutting processes for receiving the band. Likewise, the fuse could not be attached to the shell body without its being absolutely finished in all its constituent parts and without the shell body itself being developed to a full stage of completion, including the nosing and shaping of the apex and the careful threading of the shell body so that the two can be screwed into each other.

Bear in mind while reading this description that the Forge Company made only rough forgings. These rough forgings were part of the material, in convenient shape, from which the purchaser manufactured shell-bodies. They were not parts of shells; and the Forge Company was not manufacturing parts of shells. A person *is manufacturing* what he has when he completes his manufacturing processes (in this case rough steel forgings—material in convenient shape *for making shell-bodies*).

The purchaser, in the manufacture of shell bodies for projectiles, puts one of these forgings through 27 distinct and separate processes before it becomes a finished body of a projectile (Record, p. 125). In this manufacture its weight is reduced from about 170 pounds to 77.45 pounds; that is, 55% of the steel is planed or bored away and thrown into the scrap heap (Record, p. 117); and the value of the remaining metal which was contained in the forging is increased from \$8.50 to \$20 (Record, p. 128). In other words, when the Forged Steel Wheel Company sold this forging, \$6.00 represented the value of the steel contained in it, and \$2.50 the work done in forging it into the particular shape (Record, p. 130). The projectile manufacturer afterward put \$11.50 worth of work and labor on it in order to manufacture it into a part of a shell.

These 27 distinct processes are required so that the shell body may have an exact size both in exterior and interior, the variation admitted being only a few thousandths of an inch. The shell body must, when finished, have an exact weight. Its exterior and interior must both be absolutely centered or true to the longitudinal axis of the shell. The thickness and weight of the material must be absolutely and accurately distributed to its proper place, so that each shell body shall be exactly like all the others; otherwise they would not "fly" the same, the time fuse would be ineffective, and they would be dangerous to use in a barrage. In fact, *the rough shell forging and the finished shell body are so unlike that it is apparent upon inspection that they are not the same thing at all;*

that the one is simply a lump of steel from which the other is made by a long, complicated, and expensive mechanical process, involving the highest degree of skill and care.

Upon a mere inspection of the rough forging and a comparison of its form and stage of development with the shell body itself as finished after the material goes through the later processes, it is quite obvious that the rough forging could not be treated as a part of a shell in any common or ordinary sense, without going to the extent of successfully contending that the material composing it, back to the ore stage, is a part of the shell as subsequently completely manufactured. In any such consideration, one would have to bear in mind that even the very chemical constituents or mechanical arrangement of the atoms or molecules of the rough forging have to be themselves substantially changed by the annealing processes through which it is subsequently put, in order to give it the required degree of hardness and toughness.

It is essential, in determining whether a particular article constitutes a part of some other article, that one should first have a clear idea of what that other article is. In the case of a whole or complete thing, like a projectile or shell, you must start with the conception of the article as a complete whole in order to be able to decide what is meant by the word "part" of it. And having thus fixed in mind what a high explosive projectile is, *it is clear that THIS ROUGH STEEL FORGING IS NOT A PART OF A PROJECTILE.*

Let us not confuse "a part of a thing" with "the partial manufacture of a thing."

A part of a thing denotes simply that which is a constituent or fraction of the whole. It is synonymous with portion, piece, fragment, section, segment, division. There is no distinction between a part and a portion; and the only distinction that we know of between a piece and a part is that the word "piece" often carries with it an idea of detachment, but ordinarily they mean the same thing, although sometimes it has become customary to use one rather than the other. You may say either a *piece* of a chair or a *part* of a chair, although you would be rather more apt to use the word *part* when you are speaking of a portion of the completely assembled chair, and the word *piece* when you are speaking of a detached leg or back. But, for the purposes of this case and this statute, there is no difference between the words; and if the statute had said a portion or a piece of a projectile instead of a part of a projectile surely no man would have contended that one of these black steel forgings was a portion or a piece of a projectile. The word "part," however, seems to be a better word to use when you are speaking of motor boats or submarines or any composite articles, and it must be borne in mind that Congress used a word which was applicable to all the things mentioned in Section 301 except explosives.

Now, it is perfectly manifest that Congress knew when they imposed the tax that many of the things mentioned, such as projectiles, torpedoes, cannon, machine guns, revolvers, electric motor boats, and sub-

marines, were composite articles made of many assembled, completely manufactured parts; and it is perfectly manifest that this was the reason why, after they had levied a tax upon the manufacture and sale of those things, they added the words "or any part of any of the articles mentioned."

Just here we must bear in mind the very clear distinction between a tax levied upon the manufacture and sale of *a part* of a thing and a tax levied upon *a partial manufacture* of the thing. The first is necessarily a tax levied upon the manufacture of the finished part; the other is a tax levied upon any stage of the manufacture of the thing. We think the general understanding of the words in the English language, as found in the definitions in the dictionaries and in those laid down by the United States judges in the decisions, may be stated in this way: A *part* is a portion taken from the whole and still retaining all the properties of the whole, except only extent; whereas *partial manufacture* (the physical thing) marks a mere stage in the development of the material toward a predestined product. We must also bear in mind that Congress was well aware of this distinction, because there are many revenue acts which levy a tax upon partially manufactured articles.

A short passage in the Metals and Manufacturers of Metals' Schedule under Sec. 1 of the present Tariff Law, the Act of October 3, 1913, Ch. 16; 38 Stat. 114, will illustrate well enough the versatility of Congress in using discriminations of this kind:

"121. Axles, or parts thereof, axle bars, axle blanks, or forgings for axles, whether of iron or

steel, without reference to the stage or state of manufacture, not otherwise provided for in this section, 10 per centum ad valorem: *Provided*, That when iron or steel axles are imported fitted in wheels, or parts of wheels, of iron or steel, they shall be dutiable at the same rate as the wheels in which they are fitted."

Again, *it follows inevitably that a man cannot be said to be taxable as a manufacturer of a part of a projectile unless the making of that part was carried forward by him to the same stage or point of completion to which it would have been necessary to carry it if he had been the manufacturer of the completed projectile*; and that the person who manufactures a thing is he who puts it into final shape so as to be serviceable and useful for the purpose intended. What is done prior to that time can only be either (a) a partial manufacture of the thing, or (b) the furnishing of material which is used in the manufacture of the thing.

Among all the persons whose labor and materials result in the production of an article manufactured from the primitive raw materials, that one alone is the manufacturer of the article, who makes the thing which conforms to the ultimate design to be effected.

DISCUSSION OF THE REVENUE ACT.

The Revenue Act, approved September 8, 1916, contains several titles. A portion of the Act comprising Sections 300 to 312, inclusive, is preceded by the words, "Title III—Munition Manufacturers' Tax." The first paragraph of Section 301 is as follows:

"That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured within the United States."

Section 302 says:

"That in computing net profits under the provisions of this title for the purpose of the tax, there should be allowed as deductions from the gross amount received or accrued for the taxable year

from the sale or disposition of such articles manufactured within the United States (italics ours) the following items:

“(a) The cost of raw materials entering into the manufacture.”

Section 303 says:

“If any person manufactures any *article* (italics ours) specified in Section 301.”

Section 304 is as follows:

“On or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, a true and accurate return under oath shall be made by each person *manufacturing articles specified in section three hundred and one* (italics ours) to the collector of internal revenue for the district in which such person has his principal office or place of business, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the **gross** amount of income received or accrued from the sale or disposition of the articles specified in section three hundred and one, and from the total thereof deducting the aggregate items of allowance authorized in section three hundred and two, and such other particulars as to the gross receipts and items of allowance as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may require.”

Section 310 imposes severe penalties, to wit, a fine not exceeding \$10,000, and imprisonment not exceeding one year, upon the persons who violate the Act in certain particulars.

It is clear that the first part of section 301 is descriptive of the *person* who is to be taxed and the second part states *what* he is to be taxed upon.

It is "every person manufacturing," i. e., who manufactures, certain named articles, among others, "projectiles" or "any part of any of the articles mentioned" who is taxed, that is "shall pay"

"An excise tax of 12½ per centum upon the entire net *profits* actually received or accrued for said year from the *sale* or disposition of such (said) *article* manufactured within the United States."

Now when you know that a projectile is a composite article composed of many parts assembled together there is no difficulty in applying the *plain language of the act*. The "said article" upon the profit in the manufacture of which the tax is laid is "*a projectile*" or "*a part of a projectile*".

It will be observed that every section is consistent with every other in its designation of the profit upon which tax is levied. It will also be observed that Congress has used no general language whatever. It does not say that "every person who manufactures munitions" or "every person who manufactures death-dealing instrumentalities useful in war" is to pay a tax upon

profits, and in this respect, as we shall show, it differs vitally and fundamentally from the opinion rendered by the Circuit Court of Appeals. The effort of that Court has been to find some general words which would make taxable profits made in the manufacture of other things than the specific articles mentioned in the Act of Congress.

In Section 301, the tax is imposed upon profits that a manufacturer derives from the sale of the specific articles mentioned which had been manufactured by him. The intent of Congress to tax only the profits from the particular articles is clear, because it says: "The profits from the sale or disposition of such articles." The word "articles" itself is an apt and proper word to use to limit the meaning to the things which have been designated.

Section 303 says: "If any person manufactures any article *specified* in Section 301." So Section 304 says: "Each person manufacturing *articles specified* in Section 301" must make a return to the collector of internal revenue setting forth the gross amount of income and the profits "received or accrued from the sale or disposition of the articles *specified* in Section 301."

We see therefore that the obligation imposed by Congress upon manufacturers to make returns, and the provisions that Congress made with reference to the method of calculating profits are both specifically and accurately limited by Congress to the persons who manufacture the articles *specified* in Section 301. We submit that it would have been impossible for Congress

to use any stronger words of limitation than the words "specified" and "article." There is no stronger word that one can use in connection with the word "article," in order to exclude other things, than to say that it is the article *specified*.

Now, having regard to the ordinary meaning of language as used by English-speaking people, it is perfectly clear that the manufacturer of a projectile or any other article, is he who makes the projectile; that a thing is not a projectile until it *is* a projectile, and it is equally clear that a manufacturer of a part of a projectile is a man who has carried forward the manufacture of a part to the same stage or point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the complete projectile; that is, to a point where it is put into final shape so that it can be used for and become a part of the projectile when the different parts are assembled together in the whole thing, to wit, the projectile.

If it is necessary to go any further with this line of argument, it is perfectly clear that Congress did not intend to tax the materials which were used by the person who manufactured either the whole or only part of the projectile.

In the first place, as we have already seen, Section 302 expressly states that the manufacturer may deduct "the cost of raw materials entering into the manufacture."

In the second place, when the Act was originally in the House of Representatives, the section in question was in the following shape:

“Sec. 41. (1) That every corporation manufacturing (a) gunpowder and other explosives; (b) cartridges loaded and unloaded, caps or primers; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of the articles mentioned in (b), (c), (d) or (e) shall pay for each taxable year an excise tax of ten per cent. upon its entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.

(2) And every corporation selling or manufacturing for any corporation mentioned in paragraph (1) any material entering into and used as a component part in the manufacture of any of the articles enumerated in (a), (b), (c), (d), (e) or (f) shall pay for each taxable year an excise tax of five per cent. upon its net profits actually received or accrued for said year from the sale or disposition of such material so entering into or used as a component part in the manufacture in the United States of the articles so enumerated as aforesaid.” (See page 1341, *Congressional Record* for 1916.)

Sub-section (1) with some alterations constitutes the present law and we see that it contains these same words "or any part of any of the articles mentioned"; but sub-section (2) imposed a tax upon persons manufacturing for the projectile manufacturers any material entering into and used *as a component part* in the manufacture of projectiles. But this sub-section was stricken out before the bill was passed (see pp. 13492-13511).

With this reference to the provisions of the Act itself, let us see how the Circuit Court of Appeals applied it, and the line of reasoning which led it to reach its conclusion:

THE CIRCUIT COURT OF APPEALS' CONSTRUCTION OF THE ACT.

We submit that the Circuit Court of Appeals adopted an entirely erroneous standard of construing this statute and that an erroneous construction was necessary in order to sustain the tax collected in this case. In violation of all well known rules the court refused to ascertain the intent of Congress by following the well established meaning of the language used, but on the contrary based its determination of the intent of Congress upon what it conceived to be the purpose of the statute—a highly artificial process which, as we understand the authorities, may not be resorted to where the words of the Act, as here, have a well settled and adjudicated meaning.

The court states the congressional intent as follows:

“In ascertaining the true construction of the law and thus carrying out its purpose, this Court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the world war, great quantities of war munitions and war accessories had been manufactured in this country and sold to the Allied Governments at high and abnormal prices, owing to the fact that they were abnormal products and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation.”

(p. 299.)

And again:

“In addition to the feeling that these war supplies manufactured here and sent abroad were proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, *the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act. It will*

thus be seen that whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. (Italics ours.) And since all that were thus sent abroad were manufactured here, indeed the Act is expressly directed to 'such articles manufactured within the United States,' and the profits made from such manufacture were the gauge of the taxation imposed, it is clear that the means Congress used to bring the whole subject matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured and to impose an excise tax on the person who manufactured such articles or 'any part of any of the articles mentioned' and to fix such tax by 'the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.' " (p. 299.)

And again:

"Turning to the act, we think the broad purpose of Congress is clear to select as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So also the articles that in their completed, unitary form were adapted solely for war purposes might have parts which in and

by themselves, could be also used and would naturally be used for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles or parts of articles, when sold in ordinary commerce, did not earn war profits, and second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gun powder, explosives, caps and the like, by the Act providing that such of said articles as are 'used for industrial purposes' are excepted. It would therefore seem that the broad general purpose was to include in the field of taxation, all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making for the making of war articles."

(Contrast this with the requirement of Congress in Section 304, that everyone manufacturing the "*articles specified in Section 301*" must make a return.)

It will thus be seen that the reasons that the court gives for construing the language in the way that it does are (a) Congress felt that the large abnormal profits incident to *war contracts* created a remunerative field for temporary taxation; (b) that the *pacifist spirit* abroad in the United States urging embargo legisla-

tion to prevent the exportation of *war supplies* made the profits from such business an attractive field for taxation, or, in other words, the popularity of the business with certain people made it an attractive field for taxation; (c) that it is, therefore, clear that Congress intended to bring the *whole subject matter of war munitions and war accessories* within the sphere of taxation, and (d) as the court below says finally the broad purpose of Congress thus became clear to tax the manufacturers of *all articles* or parts of articles which were adapted solely for war purposes and as were withdrawn from the general field of commerce and used for the making of war articles.

Thus it would seem that the conclusion of the court below as to the meaning of the act which enabled it to say that the tax upon the profits of the Forged Steel Wheel Company was legitimate was that the Forge Company had manufactured something which was "withdrawn from the general field of commerce and used for the making of war articles."

It will be noted that the Circuit Court of Appeals was led to reach this conclusion for the reason stated above, that is, it is the judge's belief that it was the intent of Congress to tax such things and it will also be observed that it is nowhere argued in the opinion that the words which Congress used in the statute have any such meaning.

Now we think this really means that the manufacturer of any material used in the manufacture of war supplies is taxable, provided the material has been made in a size, shape or of an integral structure which fits it for use in the manufacture of a cannon for example, and unfits it for sale to the trade generally.

This theory is in direct opposition to the words of the act:

(a) The act mentions *certain specific articles* and over and over again refers to "the articles mentioned" a clear and specific declaration that no other articles are included.

(b) Congress itself rejected the proposition to tax the manufacture of materials used in the manufacture of any of the articles enumerated.

(c) It renders nugatory what Congress said about "parts."

Manifestly if Congress in taxing the manufacturer of an article meant to tax the manufacturer of the material that went into the article, it did not need to say anything about "the manufacture of a part" of the article. Does not the fact that Congress mentioned the manufacture of a part of the article show that it did not intend to tax the material man?

This theory also discloses a mistaken idea as to manufacturing practice. The Court's thought seems to be that steel is steel and that is ordinarily sold in

some sort of shape which fits it for "the general field of commerce." But quite the contrary—Steel is ordinarily *made* for the purchaser and to his specifications, both as to quality and shape. Practically and in reality projectile steel for example is withdrawn from the general field of commerce not when it takes a shape that unfits it for any other use, but when the projectile manufacturer orders it to be made.

It is confidently submitted that the decisions of the Circuit Court of Appeals violates three fundamental and established rules of law:

(1) That the intent of Congress is to be derived through the meaning of the words used to express that intent, and that that meaning, when ascertained, not only determines the meaning of the statute but the intent of Congress in enacting it.

(2) Revenue laws "are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business."

(3) "In every case of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens."

THE INTENT OF CONGRESS IS TO BE DERIVED THROUGH THE MEANING OF THE WORDS USED TO EXPRESS THAT INTENT, AND THAT MEANING WHEN ASCERTAINED, NOT ONLY DETERMINES THE MEANING OF THE STATUTE, BUT THE CONGRESSIONAL INTENT IN ENACTING IT.

In *United States vs. Goldenberg*, 168 U. S., 95, 102, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function to legislate, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies * * * justify any judicial addition to the language of the statute."

And in *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1, 37:

"As declared in *Hadden vs. Collector*, 5 Wall, 107, 111, 'what is termed the policy of the govern-

ment with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.'

*Where the language of the act is explicit, this Court has said 'there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the Court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.'* *Scott vs. Reid, 10 Pet., 524, 527.*"

REVENUE LAWS "ARE DESIGNED TO OPERATE UPON THE PUBLIC AT LARGE, AND ARE SUPPOSED TO USE WORDS IN THE SENSES BELONGING TO THE FAMILIAR LANGUAGE OF COMMON LIFE AND COMMERCIAL BUSINESS."

This language is from Justice Story's opinion in *United States vs. Wigglesworth*, 2 Story's C. C. Rep., 369 (1842). He says (p. 373):

"It would be quite too perilous to found an interpretation of any law upon a verbal distinction so refined and subtle, and *a fortiori*, to found such a distinction in cases of Revenue Laws, which

are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business." * * *

This rule is so well established that the citation of any further authorities seems unnecessary.

IN EVERY CASE OF DOUBT, SUCH REVENUE STATUTES ARE CONSTRUED MOST STRONGLY AGAINST THE GOVERNMENT AND IN FAVOR OF THE SUBJECTS OR CITIZENS.

In *Gould vs. Gould*, 245 U. S., 151 (1917), Justice McReynolds says, page 153:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen: *United States vs. Wigglesworth*, 2 Story, 369; *American Net & Twine Co. vs. Worthington*, 141 U. S., 468, 474; *Benzinger vs. United States*, 192 U. S., 38, 55."

One reason for this rule, as stated by Mr. Justice Story, in *United States vs. Wigglesworth*, 2 Story's C. C. Rep., 369, is,

"Revenue statutes are in no just sense either

remedial laws or laws founded upon any public policy, and therefore are not to be liberally construed."

In *Rice vs. United States*, 53 Fed., 910 (1893), C. C. A., Judge Caldwell quotes with approval the reason for the rule given by Lord Cairns, in *Partington vs. Attorney General*, L. R., 4 H. L., 100, 122:

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed, comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute!"

THE FUNDAMENTAL IDEA OF A MANUFACTURED ARTICLE IS THAT IT MUST BE SO NEARLY COMPLETED AS TO BE SERVICEABLE FOR THE PURPOSE FOR WHICH IT WAS DESIGNED.

In *United States vs. Potts*, 9 U. S., 284 (1809), the question was whether round copper plates, turned up at the edge, and intended to be made into cooking utensils, were manufactured articles or raw copper.

Chief Justice Marshall says (p. 287) :

“From the facts stated, the copper in question cannot be deemed manufactured copper, within the intention of the legislature.”

In *Laurence vs. Allen*, 48 U. S., 785 (1849), the question was whether certain imported rubber was manufactured or unmanufactured India rubber. It appeared that it was customary in the foreign country to dip crude clay models, representing a bottle, or a shoe, or some such thing, in the sap of the tree, and by evaporation to let the sap harden on the models. Then by breaking out the clay they had left crudely shaped shoes or bottles, or something of the kind. It appeared also that it was the habit of importers in the United States to import rubber in this shape, which they used in the subsequent manufacture of articles, including india-rubber shoes made in entirely different ways to suit the American and European markets. This manu-

facture involved re-melting the rubber shoes which had been imported, and using them simply as raw material. It appeared, however, from the evidence that the India rubber shoes imported were in such a condition that they could be worn without further labor upon them, and were made for the purpose of being so worn and were often actually worn in this form. It was held that they were dutiable as India rubber shoes because they were a completely manufactured article. And the fact that it might suit some manufacturers' convenience to use them as a raw material was not controlling.

Justice Woodbury says (p. 794) speaking of the more modern idea attached to the word manufacture, * * * * "it is making an article, either by hand or machinery, into a new form capable of being used, and designed to be used, in ordinary life."

He says again (p. 793):

* * * "It is manifest that the India rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful and convenient form for other manufacturers here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is 'unmanufactured,' or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that

policy or purpose, it is ‘manufactured’ as it is made in a shape for use as a manufacture *without being afterwards materially changed in form*, and is designed to be so used, and hence comes in as a competitor with our own manufacturers.”

Hartranft vs. Wiegmann, 121 U. S., 609 (1886), is considered the leading case upon this subject. The question was whether the sea shells there imported, upon which certain ornamental designs had been etched or carved, were still sea shells and came in free, or whether they were manufactured shells and subject to duty.

Justice Blatchford says (p. 615) :

“They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.”

Dejonge vs. Magone, 159 U. S., 562 (1895), was a case involving the manufacture of paper.

Justice White says (p. 568) :

“There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufactures of paper.”

In *Anheuser-Busch Brewing Association vs. United States*, 207 U. S., 556 (1907), Justice McKenna says (p. 562) :

“There must be transformation a new and dif-

ferent article must emerge, 'having a distinctive name, character and use.'

In re Blumenthal, 51 Fed. Rep., 76, Circuit Court, S. D. New York (1892) (Affirmed 4 U. S. C. C. A., 680),

The question was whether certain small polished disks of mother of pearl which were completed buttons, except that they were not pierced with holes or shanked through their centers, were dutiable as buttons.

Judge Lacombe says (p. 78) :

"The question to be determined here is whether they are 'buttons' within the language of the tariff act—language which is to be taken in its ordinary meaning unless it appears that trade and commerce have given some specific meaning to the words employed. Now, although they may stop short of being complete buttons by a very small measure, that circumstance is immaterial. * * *"

"According to the usages of common speech, these articles here are not completed buttons, because they lack the essential element of a device whereby they may be affixed to garments."

United States vs. Reisinger, 94 Fed. Rep., 1002, C. C. A., Second Circuit (1899).

It was held that carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which had to be cut into suitable lengths and the ends pointed

or ground before they could be used, were not dutiable as carbons for electric lighting.

The Court said, *Per Curiam* (p. 1003) :

"Accepting these findings as correct, we concur in the conclusion of the board that although ultimately intended for electric lighting, the fact that it is necessary to bestow further labor on them in order to fit them for such use precludes their inclusion in paragraph 98."

Hunter vs. United States, 134 Fed. Rep., 361, C. C. A., Second Circuit (1904).

The articles in question were pieces of paper, cut by machinery into appropriate shapes and sizes so that they could be folded and pasted and would then form an envelope.

Judge Lacombe says (p. 362) :

"In common everyday speech the word 'envelope' is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be inclosed. The 'blanks' here imported have not yet become such case or wrapper, even though they may be of such shape and size as to unfit them for other purposes. It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the side and bottom flaps. These are substantial steps in the process of manufacture."

Tide Water Oil Co. vs. United States, 171 U. S., 210 (1897), is a leading case, and is known as the "Box-Shook Case."

Justice Brown says (p. 217) :

"* * * the finished product of one manufacture thus becoming the material of the next in rank."

Again (pp. 217-218) :

"It is not always easy to determine the difference between a *complete* and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, *in which the process of manufacture stops short of the completed article*, can only be said to be *partially manufactured* within the meaning of this section."

Again (p. 218) :

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; *while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product*, such for instance as the different parts of a watch which need only to be put together to make the finished article."

United States vs. Semmer, 41 Fed., 324 (1890), Circuit Court, S. D. New York, was a case which involved the question whether the glass imported was completely manufactured.

Judge Laconfe says (p. 326) :

“ * * * the mere fact of the application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws, unless the application of such labor is carried to such an extent that the article suffers a species of transformation, and is changed into a new and different article, having a distinctive name, character or use. * * * ”

“ * * * The labor bestowed upon the article is to be continued to such an extent as to transform it into a new and different article commercially, having a distinctive name in commerce, having a distinctive character commercially, or having a distinctive commercial use.”

Erhardt vs. Hahn, 53 Fed., 273 (1893), C. C. A., Second Circuit, was a case which involved duties upon agate and other semi-precious stones, cut, ground and polished into the shape and for the uses, respectively, as penholder handles, knife handles, button-hook handles, etc. The court held that they were not manufactured articles.

The court says (p. 275) :

“ It has been repeatedly decided, under the tariff acts, that where an article has been advanced

through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a *completed* shape designed and adapted for a particular use, it is deemed to be a manufacture."

In *Robertson vs. Gerdan*, 132 U. S., 454 (1889), the question involved was whether pieces of ivory for the keys of pianos and organs are musical instruments.

Justice Blatchford says (p. 459) :

"It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments."

In *Worthington vs. Robbins*, 139 U. S., 337 (1890) the question was what duty should be imposed upon white hard enamel imported for the purpose of making watch dials.

Justice Blatchford uses this language (p. 338) :

"* * * in the form or condition as imported, it cannot be used for any of the purposes above described, nor for any purposes whatever of practical use to which it is adapted or ever applied; and that, *before it can be applied to any practical use*, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied."

Boltonstall vs. Wiebusch, 156 U. S., 601 (1894), was a case which involved the question whether carpenters' pincers, scythes, and grass-hooks, made of forged steel, were taxable as forgings of iron and steel, or as manufactures composed of iron and steel. The court held that they were not taxable as forgings, although they were made by forging, because there had been two additional processes after the forging, to wit, (1) tempering and (2) grinding.

Justice Brown says (p. 603):

"But we do not understand the term '*forgings*' to be applicable to articles which receive treatment of a different kind than hammering before they are complete; such, for example, as grinding, tempering, or polishing."

Allen vs. Smith, 173 U. S., 389 (1898),
and

Burdon Sugar Refining Co. vs. Payne, 167 U. S., 127 (1896), the "Sugar Bounty Cases," are illustrative of the same proposition. Here it was held that the man who completed the manufacture of sugar was the one who was entitled to the bounty.

In *Allen vs. Smith*, Justice Brown says (p. 399):

"In a number of cases arising in this court under the revenue laws, it is stated that the word 'manufacture' is ordinarily used to denote an

article upon the material of which labor has been expended to make the *finished product*. * * *"
(p. 400):

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (p. 401):

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it."

Schoverling vs. United States, 142 Fed., 302 (1906), C. C., Southern District, New York, before Judge Hazel.

It was held that certain India rubber pads for guns were not dutiable as shot guns or *parts of shot guns*.

Norris vs. Pennsylvania, 27 Pa., 494 (1856), involved the question whether iron in form and size fitted and designed for locomotive engine tires, with flanges, so as to require only to be cut the proper length, turned, welded and adjusted to the cast iron wheels, were parts of a locomotive.

Justice Black uses this language (p. 496) :

"To *make* in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process."

In re First National Bank of Belle Fourche, 152 Fed., 64 (1907), C. C. A., Eighth Circuit.

Justice Sanborn uses this language (p. 67) :

"* * * it (the company) produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it."

In *Central Trust Co. vs. Lueders*, 221 Fed., 829 (1915), which was affirmed by the Circuit Court of Appeals, Sixth Circuit, Justice Knappen says (p. 838), quoting Mr. Justice Brown, that the word "manufacture,"

"is now ordinarily used to denote an article upon

the material of which labor has been expended to make the finished product."

And again, quoting Mr. Justice Field:

"Manufacture is transformation, the finishing of raw material into a change of form or use."

Vandegrift vs. United States, 164 Fed., 65 (1908), Circuit Court, E. D. Pa. Judge McPherson says in this tariff case (p. 69), quoting with approval the General Appraiser in *In re Eckstein*, G. A., 5822:

"These decisions amply support the proposition that, in order to constitute a manufactured article, the processes of manufacture devoted to it must be so far completed as to render the article ready for common use, known and designated by a common name, *without additional processes of manufacture.*"

In *United States vs. Thomas Prosser & Son*, 177 Fed., 569 (1910), Circuit Court, S. D., New York, Judge Martin says (p. 571):

"As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal."

In *Bromley vs. United States*, 154 Fed., 399 (1907), Circuit Court, E. D. Pa., Judge Holland says (p. 400):

“* * * the word ‘castings’ in the trade does not include articles made by the casting process which have been advanced in condition by work bestowed on them after they were cast.”

In *Bromley vs. United States*, 156 Fed., 958 (1907), Circuit Court of Appeals, Third Circuit, Judge Buffington says (p. 959):

“In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article.”

The only case in the books that could be considered at all in conflict with these authorities is the case of

United States vs. Riga, 171 Fed., 783 (1909), Circuit Court, District of Massachusetts, Lowell, Circuit Judge, which involved the question of whether rough bored rifle barrels were dutiable as rifles or parts thereof.

It was held by the court that although these particular rifle barrels had still to be rifled and colored, they were parts of rifles. The case is an extreme one and seems to run counter to all the other decisions. But Judge Lowell’s opinion is based upon the proposi-

tion that they were substantially completed. He says (p. 784) :

"In the case at bar the imported article upon mere inspection is found to be nothing other than a rifle barrel, made solely for use as a part of a rifle and absolutely suitable for no other purpose. The fact that the barrels are not wholly finished we do not consider important, for otherwise an importer could change classification by merely omitting to put the *final touch* upon an article, thus rendering it impossible to assemble the parts in their imported state."

Again (p. 784) :

"A rough-bored barrel, *when approaching nearly the finished condition*, affords sufficient evidence as to its special adaptation for use as a rifle barrel, and would appear to us to be entitled to be so considered."

IT IS EVIDENT that when we speak of a MANUFACTURED article or of a MANUFACTURER of an article, we mean A THING or a MANUFACTURER of a thing that has been CARRIED to a state of substantial completion, so that it is capable of USE by the purchaser or user as the thing which was designed, or WHICH THE MANUFACTURER and the consumer were contracting about.

UNDER THE AUTHORITIES A PART OF A
THING MEANS A SUBSTANTIALLY
FINISHED PART.

The following cases are directly in point:

United States vs. Thirty-one Boxes, 28 Fed.
Cases, 56, District Court, S. D. New York
(1833).

The question was whether pieces of round iron cut into suitable lengths, some being straight and others curved or bent to a U shape, and which were adapted to be formed into the links of cables, were dutiable under the description of "cables and parts thereof," as used in the Act of 1824.

The court held that they were not.

Judge Bets says (p. 61):

"A link considered as a substantive article of manufacture, must unquestionably be *finished*, have every operation performed upon it required to fit it for the use it is destined for; whether round or oval, open or closed, it becomes the link only when the artisan has completed his labor upon it. The link which forms part of a chain cable must necessarily be closed; neither a straight piece of rod, nor bent at one end, nor turned so as to bring the two ends nearly into union, can in accuracy be said to compose that description of link."

And again (p. 61) :

"But whether this be so or not, it is very clear to my mind, that in the sense of the Act of 1824, nothing can be deemed part of the chain that is not as to itself, as finished and complete as the entire chain."

And again (p. 62) :

"In this view of the subject, the part may consist of several fathoms, or any less extent beyond individual detached links. It denotes a portion taken from the whole, and still retaining the properties of the whole, less only the extent."

In *Vanacker vs. Spalding*, 24 Fed. Rep., 88, Circuit Court, N. D. Illinois (1885), it was held that small India rubber bags, which were intended for the purpose of being inflated with gas, thereby making a small balloon to be used as a child's plaything, were not dutiable as toys.

Judge Blodgett says (p. 88) :

"The only question is whether such an article is a 'toy' or 'a manufacture of India rubber, not otherwise provided for.' I am of opinion that these goods are not 'toys' in the form in which they are imported. In order to make them saleable as toys, they must be inflated and closed so as to retain the gas, and although this is but a slight addition to them, still they cannot be called playthings or toys until this process is completed."

United States vs. Simon, 84 Fed. Rep., 154, Circuit Court, S. D. New York (1897).

It was held that India rubber tubing, in meter lengths, colored, chiefly used in making stems of artificial flowers, were not dutiable as parts of artificial flowers.

Judge Wheeler says (p. 154) :

“The paragraph under which this manufacture was assessed does not provide a duty on materials for artificial flowers, but for *parts of artificial flowers*, which distinguishes this importation from that in the former case; and this tubing is not any finished part of an artificial flower, but is merely a material from which the stems, as such a part of an artificial flower, can be made.”

In *Grempler vs. United States*, 107 Fed., 687 (1901), C. C. A., Second Circuit, Judge Townsend uses this language, which is very pertinent to our case (p. 688) :

“It is contended that this merchandise is *partly manufactured*, because it has been thus made into sheets. This contention is met by proof that these sheets are not available for any purpose until after they have been beaten to one-sixth their present thickness, and then cut into pieces and put into books to be sold, apparently for use in gilding.”

Boker vs. United States, 97 Fed., 205 (1899), C. C. A., Second Circuit, was on appeal from the Circuit Court, affirmed *per curiam* on the opinion of Judge

Townsend in the Court below. The question was whether nickel alloy, in the form of rods, sheets, and wire, should be assessed as manufactured articles and wares, composed wholly or in part of any metal, and whether *partly* or *wholly* manufactured, or, under another section, as nickel or alloy of any kind in which nickel was the component material of chief value.

It was held that the wire was properly taxable as a manufactured article, but that the rods and sheets could not be so regarded and were taxable under the raw-material section.

Judge Townsend gives (p. 205) as his reason for not taxing the rods and sheets that—

“They are incapable of practical use without being subjected to further manipulation and manufacture.”

and, conversely, as the reason for saying that the wire was taxable—

“The wire is a manufacture of metal, a complete merchantable article, imported in spools, and sold by the spool, to be used in the construction of rheostats, and dealt in commercially in various sizes, adapted to the purposes for which it is wanted.”

There are also many decisions of the Board of General Appraisers to the same effect. For example—

In re Protest of Reiss Brothers & Co., T. D., 16977, G. A., 3405, Synopsis of Treasury Decisions, 1896, p. 273.

It was held that blocks of meerschaum that were shaped like pipe bowls and which were so far advanced in manufacture as to be unfit for any other purpose than pipe bowls, but which were incomplete in not being bored out so as to have an orifice to hold the tobacco and which had no orifice for the insertion of the pipe stem, were not dutiable as pipe bowls, because they had "not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact."

In *T. D.* 21719, G. A. 4590, Treas. Dec., Vol. 2, p. 615, it was held that pieces of polished hard rubber, intended for mouth pieces for pipes, but which had to be bored and have screws put in in order to render them suitable for smokers' use, were not dutiable as smokers' articles.

The same decision was made in

T. D. 32396, which was another India rubber pipe mouth-piece case.

In re Protest of United States Express Co., *T. D.* 35697, Treas. Dec., Vol. 29, p. 203, it was held that pieces of wood, which had been roughly carved into the shape and form of a pipe bowl, but which had to have a number of additional steps taken before they would be a finished product, were not dutiable as pipe bowls.

Protest of Benedict Weiss, Treas. Dec., Vol. 29, p. 796, was another pipe bowl case, and reads the same way.

Parts of Musical Instruments, *T. D.* 27207.

The question there before the Board of General Appraisers was about blocks of granadilla wood, rough turned and bored, and intended for use in the manufacture of clarinets. The Board of General Appraisers says (p. 397) :

“Paragraph 453 provides for musical instruments and parts thereof. The disputed articles are in the nature of materials intended to be made into musical instruments, *but in their rough condition as imported they certainly are not parts of such instruments.* It is doubtful if any but completed parts which require only assembling to make them musical instruments, or are intended to supply a missing part thereof, would be included in this paragraph. A reference to paragraph 434, which provides for parts of jewelry, finished or unfinished, by inference would seem to exclude unfinished parts of musical instruments from classification under paragraph 453, just as rubber tubing in meter lengths, colored, and adapted especially for use in the manufacture of artificial flowers, was held not to be parts of artificial flowers. *United States vs. Simon*, 84 Fed., 154.

The goods under consideration although unquestionably manufactures of wood, are in a crude condition and have to undergo a still further process of manufacture before they become parts of musical instruments. We make a corresponding finding of facts and sustain the claim that the merchandise is dutiable at 35 per cent. ad valorem under paragraph 208 of the present tariff act, the collector's decision being reversed.”

In *T. D. 2547*, printed in Corporation Trust Company's War Tax Service, 1917, p. 1208, Section 6526, a decision of the present Commissioner of Internal Revenue is quoted on the taxing of the heads of golf clubs, which the Commissioner of Internal Revenue held not to be *parts of games*.

He says, among other things:

"The one who produces the finished product is the manufacturer and is charged with the tax."

Again, in *T. D. 2570*, printed in Corporation Trust Company's War Tax Service, 1917, p. 1215, the Deputy Commissioner of Internal Revenue, G. E. Fletcher, says:

"When goods manufactured by a person require further manufacture before being used by the consumer, the one completing the manufacture is liable for the tax."

The United States Court of Customs Appeals has reached the same conclusion.

Thus in the case of *Fenton vs. United States*, 1 U. S. Ct. Cust. App., 529, the court said (p. 532):

"A part of a fishing tackle may well mean a rod or a reel, a hook or a line, and these articles are also in themselves fishing tackle and collectively so designated. But we do not think, in its common, ordinary meaning, the term 'fishing tackle' includes a rod, reel, hook, or float that is

not in *finished condition*, ready for the angler's use, and the term 'parts thereof' must refer to the *completed article*, whatever it may be, that is also ready for use either alone or in connection with other articles of the angler's outfit. *When ready for use it is a part of the fisherman's tackle, his outfit, one of his implements; and if not in a condition to be used, of course he cannot use it, and it is not fishing tackle or a part thereof.*"

THE DEPARTMENT OF INTERNAL REVENUE
HAS RULED THAT THE PART MUST BE
FINISHED.

Article XIII of the regulations, published by the Secretary of the Treasury, T. D. 2384, says:

"'Any part thereof,' as used in Section 301 of this title, is any article *relatively complete* (italics in the original) within itself and designed or manufactured for the special purpose of being used as a *component part* (italics ours) of a completed *unit*." (Record, p. 171.)

It is perfectly clear that these rough steel forgings do not fall within the definition adopted by the Department of Internal Revenue.

Again, some light may be obtained from the well-considered rulings which were put out by the Department of Internal Revenue,—at least they indicate what men familiar with revenue laws thought. These rules disclose that no one ever dreamed of placing such a con-

struction upon this statute as the Government now contends for.

In Article II, the Commissioner of Internal Revenue says that the tax is in addition to the income tax and "is an amount equivalent to 12½% of the entire net profits received or accrued to every person from the *sale* or disposition of such of the following named *articles* as are *manufactured* in the *United States* by *such persons*." He says "Projectiles as used in this title include any and all missiles to be projected from a gun," et cetera. He refers again in Article III to the persons who may have been engaged "in the business of *manufacturing* and *disposing* of such articles" (the Department comes naturally by the use of the word "articles," for they get it from the Act of Congress).

Article V, which relates to the contents of the annual return, refers to the cost of raw materials entering into the manufacture of munitions or parts of munitions and also amortization of the cost of machinery specially constructed or installed for the manufacture of munitions or parts of munitions. All the way through these rulings you will note that the Department refers to munitions and parts of munitions as quite distinct things, just as the Act of Congress does.

Article X, which relates to gross income, speaks of the amount received from the sale or disposition of the *articles* named in Section 301 and the exemption of expenses incident to the manufacture of the *articles*.

The Commissioner of Internal Revenue grasped the fact that the Act did not cover all munitions, for in Article XII he refers to net profits from the sale or disposition "of *any* munitions *enumerated* in Section 301 or any parts of the *articles* mentioned."

The Commissioner realized that the tax had to be paid on the articles mentioned, whether they were munitions or not. He says: "The fact that any of the articles named in Section 301 are manufactured and sold or disposed of in the general trade, to be used for sporting purposes, or for any purposes other than industrial, will not exempt from liability to the tax."

When the contention was made before the Department that as the title of the act is "The Munition Manufacturer's Tax," the tax could only be assessed upon profits derived from munition orders, and not from profits derived otherwise, the Department ruled to the contrary, saying that the tax was "on the profits of *the manufacturers of the articles* therein mentioned," regardless of the use to which they were put, and that the profits derived from anything mentioned therein, "even though they are sold for sporting or other purposes only in the United States in the regular course of domestic business of the manufacturer" were taxable. The Commissioner goes on to say: "In fact, except in the Title, that Act nowhere mentions munitions, and imposes the tax on *the manufacturers of certain articles*, regardless of the purpose for which they are used, with the exceptions noted." (Record, pp. 267-268.)



Then realizing that "any part" was something different from the whole and needed to be defined, he proceeded to define it. He defines it just exactly as we have contended it should be defined and as Judge W. H. Seward Thomson defined it and as all the cases in the books have always defined it,—as a completed part,—as follows (Record, p. 160):

"‘Any part thereof,’ as used in Section 301 of this title, is any article *relatively complete* (italics in the original) within itself and designed or manufactured for the special purpose of being used as a *component part* (italics ours) of a completed munition."

Under Article XIV he refers to the articles enumerated and in Article XV, when he comes to define raw material, he says that "any *crude* or elemental products or substances necessary to the manufacture of such parts, and which, *without the application of skill or science*, cannot become *component* parts or elements in the *finished* article or unit."

And so, you see, the Department has reached exactly the same conclusion on munitions that we contend for, that is, that an *article* is a finished article; that a *part of an article* is a finished part of an article, and that *material* is anything that a man who makes the finished article or part buys, and himself manipulates or changes into the article which is to be produced. (We do not mean to assert that some rulings of the Department have not been inconsistent.)

Again, if this construction of the Act, that any one is taxable who is in the munitions *business*, is the correct one, a person who is engaged in the business of *repairing* munitions would be subject to the tax, whereas it is manifest they are not, and the Department has always so ruled.

"Those manufacturers who make repairs on munitions, either for the United States Government or as regular commercial work, will not be subject to the munitions tax, provided the repairs so made are bona fide repairs and do not involve the manufacture and sale of a *completed part* of a munition." (Record, p. 257.)

THE GOVERNMENT'S CLAIM THAT THE CASES CITED BY US ARE NOT CONTROLLING BECAUSE THEY ARE IMPORT DUTY CASES WHILE THIS TAX IS NOT ON THE ARTICLE BUT ON THE BUSINESS.

THERE IS NO SUCH DISTINCTION IN THE CASES.

Thus, the question in *Allen vs. Smith*, 173 U. S., 389, and

Burdon Sugar Refining Co. vs. Payne, 167 U. S., 127, was not a question of levying a tax upon sugar or upon the manufacture of sugar, but was a case of payment of bounty to the *producer* of sugar; which we take it means the same thing as the *manufacturer* of sugar. If anything the word "producer" is a little broader than the word "manufacturer."

The Supreme Court held that it was the *man* who *produced* (manufactured) the *finished* sugar, who was entitled to the bounty. And it was upon the authority of the tax cases that the Supreme Court ruled the case.

In *Allen vs. Smith*, Justice Brown says (p. 399) :

"In a number of cases arising in this court under the revenue laws, it is said that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product*. * * *"

(p. 400) :

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (p. 401) :

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to

make up the finished watch? To state this question is to answer it."

The *Box-Shook Case*—*Tide Water Oil Co. vs. United States*, 171 U. S., 210,—involved the question whether the Tide Water Oil Company was entitled to a drawback under the provisions of R. S., 3019 (Compiled Statutes, p. 6829).

The question arose whether the articles exported had been manufactured in the United States by the use of imported merchandise or materials upon which customs duties had been paid. It was in determining the question whether the articles had been wholly manufactured within the United States that the Supreme Court turned again to the tariff cases to determine what was a manufacture. And in that case they used this language:

Justice Brown says (p. 217):

"* * * the finished product of one manufacture thus becoming the material of the next in rank."

Again (same page):

"It is not always easy to determine the difference between *a complete and a partial manufacture*, but we may say generally that an article which can only be used for a particular purpose, *in which the process of manufacture stops short of the completed article*, can only be said to be *partially manufactured* within the meaning of this section."

Again (pp. 217-218) :

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; *while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only to be put together to make the finished article.*"

So it was in the case of *Norris vs. Pennsylvania*, 27 Pa., 494, where the question was whether the plaintiff was liable to a tax which was imposed by the terms of the act upon all dealers who kept a store for the sale of goods, except "mechanics who kept a store for the purpose of vending their own manufactures exclusively."

It was held in this case that the fact that the locomotive manufacturer bought tires for the wheels did not prevent the locomotives from being his exclusive manufacture. And it was in this connection that Justice Black used the language, quoted so frequently in the tax cases that involve the question what a manufacture is, in which he said (p. 496) :

"But what is manufacturing? It is making. To *make* in the mechanical sense does not signify to *create out of nothing*; for that surpasses all human power. It does not often mean the produc-

tion of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process. A cunning worker in metals is the maker of the wares he fashions, though he did not dig the ore from the earth, or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather. A bureau is made by the cabinet-maker, though it consists in part of locks, knobs, and screws, bought ready made from a dealer in hardware."

SO WHEN THE QUESTION HAS ARISEN UNDER THE BANKRUPTCY OR INSOLVENCY ACTS WHETHER THE BANKRUPT WAS A MANUFACTURER, IDENTICALLY THE SAME TEST HAS BEEN APPLIED, AND THE SAME CASES APPEALED TO AS AUTHORITY.

First National Bank of Belle Fourche, 152 Fed., 64 (1907), C. C. A., 8th Circuit.

In re Rheinstrom & Sons Co., 207 Fed., 119 (1913).

In the case of *Central Trust Co. vs. Lueders*, 221 Fed., 829, C. C. A., 6th Circuit, which involved the question whether or not the bankrupt had been a manufacturer within the meaning of the Kentucky statute, Justice Knappen quoted with approval (p. 838) Mr. Justice Brown's language in the *box shook case*, that the term "manufacture" is "ordinarily used to denote an article upon the material of which labor has been

expended to make the *finished product*;" and further in his opinion, quoted Mr. Justice Field's language, in *Kidd vs. Pearson*, 128 U. S., 1, that "manufacture is transformation, the finishing of raw material into a change of form or use."

In *Smith vs. Rheinstrom*, 65 Fed., 984, a case in the Circuit Court of Appeals for the Sixth Circuit, the question was whether a certain preparation of cherry juice was dutiable as an alcoholic compound. The question was raised before Judge Taft, What is a manufacture? and he said that whether the article was cherry juice or a manufacture of cherry juice "must depend, of course, upon the amount of change to which the original article has been subjected to make the new article."

So in the Circuit Court of Appeals for the Second Circuit in the case of *Erhardt vs. Hahn*, 55 Fed., 273, it was said *Per Curiam* (p. 275) :

"* * * where an article has been advanced through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a *completed* shaped designed and adapted for a particular use, it is deemed to be a manufacture."

So we see that the distinction sought to be made by the Government between import-duty cases and other cases is unsound, and that the same test of whether the article has been finished or not has been applied to all kinds of cases, including the cases where

it is the person who is carrying on the manufacture who is entitled to some benefit or exemption.

THE ACT, WHEN ITS ESSENTIAL WORDS ARE GIVEN THE INTERPRETATION FOR WHICH WE ARE CONTENDING, HAS A NATURAL APPLICATION TO A GREAT NUMBER OF COMMODITIES, AND NO NECESSITY EXISTS FOR EXTENDING THE MEANING OF THE WORDS, BY ANY DOUBTFUL CONSTRUCTION, WITH A VIEW TO FINDING SUBJECTS FOR ITS OPERATION.

The act was considered mainly by the court as if it meant to tax profits derived only from shells or projectiles and their parts; whereas it included also profits from cartridges, torpedoes, small arms, cannon, machine guns, bayonets, motor boats, and submarines, and their parts. It is a matter of common knowledge that all the above articles have definite parts—some of them many parts—which are completed in finished form and supplied in the trade to manufacturers of the composite articles, and are also manufactured by munition makers themselves as independent parts and supplied to dealers and other manufacturers.

The following list is significant:

*List of Distinct Parts of Various Kinds of Articles
Mentioned in Section 301 of Title III of the Act
of September 8th, 1916, Which Are Commonly
Recognized as "Parts" for Assembling or Sale*

Purposes, and Manufactured and Known in the Art and Trade as Such.

The various articles mentioned in the above Section are well known respectively to have the following separately purchasable parts:

CARTRIDGES:

Cartridge case;
Primer;
Powder;
Wad, if any;
Projectile.

TORPEDOES (Automobile variety):

War head;
Practice head;
Explosive charge;
Air flask;
Air flask head;
Alcohol lamp;
Propelling engine;
Obry gyroscopic gear;
Many screws.

SMALL ARMS—

SHOT GUN:

Barrel;
Sight;
Hammer;
Firing pin;
Firing pin spring;
Fore end;

Trigger;
Trigger spring;
Stock;
Heel plate;
Lever;
Lever spring;
Main spring;
Bolts;
Many screws.

RIFLE (Repeating) :

Barrel;
Sight;
Magazine;
Magazine spring;
Main spring;
Trigger;
Trigger spring;
Fore end;
Fore end cap;
Receiver;
Locking bolts;
Locking bolt pin (male);
Locking bolt bushing;
Stock;
Heel plate;
Many screws.

BAYONETS:

Parts probably never sold singly to the consumer, but consisting usually of a blade; two wooden handle parts; burs and rivets.

ELECTRIC MOTOR BOAT:

Hull;
Motor;
Shafting;
Bearings;
Propeller;
Propeller nut;
Rudder;
Storage batteries;
Steering wheel;
Tiller ropes;
Tiller;
Tiller rope pulleys;
Reostat;
Controller;
Electric wiring;
Anchor;
Hawser;
Side lights;
Riding lights;
Water tanks;
Construction and trimming hardware;

Fittings, such as

Cushions;
Lavatory fixtures;
Galley stove;
Refrigerator;
Cooking equipment;
Bunks and their equipment;
Signals;
Compass;
Repair tools.

SUBMARINE BOAT:

All parts listed for electric motor boats, and
in addition

Magazine follower;

Bolt;

Firing pin;

Firing pin spring;

Extractor;

Carrier;

Carrier spring;

Finger lever;

Torpedo tubes;

Racks;

Oil engines;

Ignition system;

Oil tanks;

Camera Lucida;

Gyroscopic compass;

Steering engine;

Air pump;

Water pump;

Compressed air tanks;

Valves and fittings;

Manometers;

Pressure gauges;

Engine room signal system.

REVOLVERS AND PISTOLS:

Many parts, as in the case of rifles and shot
guns.

CANNON:

Gun proper;
Breech mechanism, consisting usually of
Breech block;
Mushroom;
Gas check rings;
Gas check pad;
Mushroom nuts, washers and springs;
Carrier;
Rotating gear;
Lever handle;
Hinge bolt;
Frequently many other parts.

MACHINE GUN:

The machine gun contains most of the parts of a rifle, and many others, chiefly connected with the automatic features.

The profits derived from the sale of every one of the above parts were hit by the act. They were what were aimed at by Congress. It was a large target. The lower Court seems utterly to have ignored the existence of the above parts as the natural basis for the application of the act to "parts."

CONCLUSION.

The argument for the Government in this case has passed through many stages. The first suggestion was that these rough steel forgings were parts of projectiles, and at the trial of the case in the Court below, that was the Government's contention.

The weight of the cases cited by petitioner and the rulings of the Department made it impossible for the Government to insist further upon that contention.

On motion for a new trial in the District Court, the Government fell back upon an unnatural construction of what was meant by the words "every person manufacturing," and said that those words mean "every person who engages in the business of manufacturing" and that as the Forged Steel Wheel Company manufactured something which was known by it to be, and was manufactured for the purpose of future fabrication into an integral part of a projectile, it was engaged in the business of manufacturing projectiles. This theory was also shown to be fallacious, and never received any substantial support from any of the Judges who heard this case.

The suggestion was then made by counsel for the Government in the Circuit Court of Appeals that there was what might be called a joint action or collaboration of different people in the manufacture of projectiles; that every person who took any part in the work at any

stage was engaged jointly with the other people in carrying forward a common enterprise, and that each party was responsible for the profits it made in what it did. The Circuit Court of Appeals had some difficulty, even with this proposition, because it was manifest that Congress had not imposed any tax on materials, because it said so; and since when a projectile or rifle or cannon manufacturer ordered steel, he ordered steel to be made specially for him, the man who made the steel would necessarily within the broad reasoning of the Court below, have been engaged in the common enterprise. In order to avoid the difficulty, the Court said that the liability depended upon whether or not the manufacture of the material had been carried forward to the point where, by reason of its physical shape, it became useless for any other purpose than the manufacture of a munition.

Therefore, because this particular steel had been sold in a shape that made it convenient for the projectile manufacturer's use; and suitable for his purpose, and was not of value for making automobiles or something else; it had, as the Court said, been withdrawn from the general field of commerce (whatever it meant by that) and the Forged Steel Wheel Company had become engaged in the joint enterprise and was taxable.

Here again it seems clear to us that the Judge failed to differentiate this case from the first case discussed in his opinion. In that case—*The Carbon Steel Company vs. Lewellye*—there was perhaps a basis for the joint production theory. The Steel Company had

taken the contract to manufacture and sell to the British government complete projectiles. It made the steel, rolled the rounds and then, through various sub-contractors who had machine shops, machined the steel, made the copper driving bands, the base plates, the nose bushings, etc., put them together and assembled them; the title to all the materials at all times belonging to the Steel Company, and the work that was done in the various machine works being done at the direction of the Steel Company upon its materials and in order to enable it to carry out its contract to furnish a complete projectile.

The Circuit Court of Appeals having satisfied itself that this was a joint business operation, and that every person who took part in the manufacture of the projectile was taxable upon the profit that he made, proceeded then to take up the Worth Brothers case, which was a case where the Midvale Steel Company had had the contract to furnish complete projectiles and had purchased the forgings from Worth Brothers, which was a subsidiary corporation, and the Circuit Court of Appeals applied the same theory of joint intent and common responsibility to both corporations, which perhaps on some theory of disregard of corporate entity might have some foundation.

The Court then came in the latter part of its opinion to dispose of the case of the Forged Steel Wheel Company, without differentiating that Company's case at all. That Company, as shown by the evidence, had no connection whatever with any of the people who were making munitions. It was simply a steel manufacturer. What it

manufactured was steel, and what it sold to the munition manufacturers was steel, in the shape of rough forgings. There its process of manufacture ended. It had nothing whatever to do with the success or failure of subsequent operations, was entirely without interest or concern in what the purchaser did with the forgings, whether he made projectiles out of them or threw them into the river. In fact, as appeared from the uncontradicted evidence, a large percentage of these forgings were spoiled in the subsequent manufacturing process, say from 10 to 18 per cent., which is illustrative of our Company's position in the case, because it made no difference to it whether they were spoiled or not; it was paid for the forgings as sold, regardless of their use, and one of the curiosities of this case is that we are made to pay a tax on the manufacture of forgings which never did become projectiles or parts of projectiles because they were spoiled in the manufacturing process, just as any material may be spoiled.

Furthermore, with the utmost desire to be fair to the Government, and stretching every point against itself, this petitioner, without at the time taking the advice of counsel as to the meaning of the statute, made a return and paid the United States over \$100,000 which was the total profit made in the forging process, and the tax which petitioner now seeks to recover is a tax subsequently levied and assessed purely upon its profit as a manufacturer of steel by the open hearth process; and more than that, upon the profit that it made upon the purchase of steel from the Illinois Steel Company, and which was forged by another concern, the Standard Steel Car Company (which by the

way paid a munition tax on the forgings) so that petitioner has been compelled here to pay considerably over \$100,000 out of profits on steel forgings which were never in its shop at all—purely a dealer's profit on steel that was purchased from the Illinois Steel Company and forged by the Standard Steel Car Company.

All this shows the unfairness of attempting to make the liability for tax depend upon some vague idea of Congressional intent, instead of on the words of the statute, and in effect to rule that a man who fails to make a return because he did not manufacture one of the articles specified in the Act, is nevertheless liable to the pains and penalties of this statute, because the Commissioner of Internal Revenue or the Courts think that Congress intended that something should be taxed which is not specified in the statute.

GEORGE SUTHERLAND,
GEORGE B. GORDON,
WILLIAM WATSON SMITH,
JAMES MCKIRDY,
Attorneys for Petitioner.

APPENDIX.

PARTIAL LIST OF CLAIMS PENDING AT DATE OF DECISION OF PRESENT CASE BY
CIRCUIT COURT OF APPEALS JUNE 9, 1919.

Name of Claimant	Amount of Tax Claim	Year	Material	Jurisdiction	Court of Appeals	Status
Worth Brothers Company..	\$ 74,857.07	1916	Rough Shell Forgings.....	U. S. Circuit Court of Appeals Third Circuit	Judgment for Collector.	Judgment vs. Collector. Reversed.
Forged Steel Wheel Co....	246,920.18	1916	Rough Shell Forgings.....	U. S. Circuit Court of Appeals Third Circuit	Judgment for Collector.	Judgment vs. Collector. Reversed.
Carbon Steel Company....	271,062.62	1916	Rough Shell Forgings.....	U. S. Circuit Court of Appeals Third Circuit	Judgment for Collector.	Judgment for Collector.
Carnegie Steel Company..	1,155,526.80	1916	Rough Shell Forgings.....	Commissioner of Internal Revenue.	Undetermined.	
Carnegie Steel Company..	742,258.99	1917	Rough Shell Forgings.....	Commissioner of Internal Revenue.	Undetermined.	
National Tube Company..	319,220.93	1916	Rough Shell Forgings and Air Flask Forgings.....	Commissioner of Internal Revenue.	Undetermined.	
National Tube Company..	71,871.51	1917	Rough Shell Forgings and Air Flask Forgings.....	Commissioner of Internal Revenue.	Undetermined.	
Shelby Steel Tube Com- pany	15,525.44	1916	Rough Shell Forgings.....	Commissioner of Internal Revenue.	Undetermined.	
The Midvale Steel Com- pany	217,967.65	1916	Rough Shell Forgings.....	Commissioner of Internal Revenue.	Claim rejected by Commissioner. Suit in Court deferred awaiting decision in present case.	

The Midvale Steel Company	57,174.54	1916	Rough Gun Forgings.....	Commissioner of Internal Revenue.Claim rejected by Commissioner. Suit in Court deferred awaiting decision in present case.
Midvale Steel & Ordnance Co.	16,287.03	1917	Rough Gun Forgings.....	Commissioner of Internal Revenue.Claim rejected by Commissioner. Suit in Court deferred awaiting decision in present case.
Dayton Brass Castings Co.	18,860.83	1916	Rough Castings for Time Fuses	District Court of United States for Southern District of Ohio. Argued and undetermined.
Dayton Bronze Bearings Co.	7,290.51	1916	Rough Castings for Time Fuses	District Court of United States for Western Division
Forged Steel Wheel Co.... Forged Steel Wheel Co.... Union Switch & Signal Co.	107,846.84 3,316.57 51,547.85	1916 1917 1916	Rough Shell Forgings..... Rough Shell Forgings..... Machine Work on Projectiles, Bodies of Shrapnel Shells, Steel Forgings for Base Plates, and Steel Forgings for Rifles.....	Commissioner of Internal Revenue.Undetermined. Commissioner of Internal Revenue.Undetermined. Commissioner of Internal Revenue.Undetermined.

Name of Claimant	Amount of Tax Claim	Tax Year	Material	Jurisdiction	Status
Standard Steel Car Co.	34,323.56	1916	Machine Work on Rough Shell Forgings	Commissioner of Internal Revenue. Undetermined.	
Standard Steel Car Co.	13,260.71	1917	Machine Work on Rough Shell Forgings	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Electric & Manufacturing Company	842,671.69	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Machine Co.	80,207.58	1916	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings	Commissioner of Internal Revenue. Undetermined.	
Westinghouse Electric & Manufacturing Co.	201,596.33	1917	Machine Work on Steel Shell Bodies, Copper Driving Bands, Steel Base Plates, Nose Bushings and Forgings	Commissioner of Internal Revenue. Undetermined.	
Curtis & Company Manufacturing Company.....	260,860.79	1916	Rough Shell Forgings	Commissioner of Internal Revenue. Undetermined.	
Curtis & Company Manufacturing Company.....	152,473.06	1917	Rough Shell Forgings	Awaiting decision before filing claim.	

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, PETI-
tioner,
v.
C. G. LEWELLYN, COLLECTOR OF INTERNAL
revenue, respondent. } No. 526.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

The writ of certiorari is sought to review a judgment of the Circuit Court of Appeals reversing one of the district court, upon a directed verdict, allowing a recovery for \$246,920.18, the amount of certain taxes, paid under protest, with interest.

STATUTE INVOLVED.

The taxes in question were collected under the provisions of section 301 of the act of Congress approved September 8, 1916 (39 Stat., ch. 463, p. 781), the pertinent parts of which are:

SECTION 301. (1) That every person manufacturing (a) gunpowder * * *; (b) cartridges * * *; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or un-

loaded, or fuses, or complete rounds of ammunition; (d) firearms * * *; (e) electric motor boats * * *; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e), shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: * * *.

SEC. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:

(a) The cost of raw materials entering into the manufacture; * * *.

This act was passed prior to our entry into the war, and before Congress had adopted the policy of levying what was known as the "War excess profits tax," and the tax was to be in effect until one year after the termination of the European War.

On October 3, 1917, the first war revenue act was passed (40 Stat., ch. 63, pp. 300, 302). This act levied an excess profits tax ranging from 20 per cent to 60 per cent. The munitions tax levied by the portion of the act of 1916 above quoted was reduced for the year 1917 from 12½ per cent to 10 per cent, and it was provided that that tax should cease to be in effect after January 1, 1918.

It will be seen that the tax in question was a temporary tax, intended, principally at least, to reach profits derived from the sale of munitions to foreign Governments, and was in effect only in the years 1916 and 1917. It will also be observed that the tax was not levied on the articles mentioned, or based on their value, but was specifically imposed upon the persons manufacturing them, and upon the profits realized by such persons from their sale or disposition.

THE FACTS.

The facts are established practically without dispute. They are very fairly stated in the opinion of the District Court overruling the motion for a new trial, and are as follows:

The petitioner during the year 1916 contracted with certain corporations of the United States and certain persons abroad, who were engaged in the manufacture of explosive shells, to manufacture according to specifications, sell, and deliver certain quantities of rough steel forgings for shells, which were to comply with the specifications imposed by the British Government. In order to fill these contracts, the petitioner took steel rounds, between 6 and 7 inches in diameter, of a grade of steel which could be used commercially for many different purposes. These were nicked and broken into lengths of 18 inches, which were then heated and put through two forging processes, by which a hole was pierced from one end to about 2 inches of the other end, and the steel thus pierced was elongated by drawing through three

successive rings in a hydraulic press, leaving the forgings in the shape of a cylinder open at one end and closed at the other, in which shape they were delivered under the petitioner's contracts. Many of these forgings were manufactured by the petitioner from rounds which it itself manufactured. Some were made from steel rounds which it purchased from other steel manufacturers, and in some instances, steel was purchased by the petitioner and the forging done for it by others. Through these three methods the petitioner furnished the rough forgings called for in its several contracts, from which it derived the profits on which the tax in question was assessed.

The rough forgings thus manufactured and delivered were, by the manufacturers to whom they were sold, by a number of machine processes, put into the final shape of the shell body. The completed shell when finally ready for use consisted of six different parts: (1) The shell body in one piece, cylindrical in shape, with a pointed head to increase its speed in flight and its power of penetration, being the rough forging turned out by defendant in error after the necessary machining had been done on it; (2) a copper driving band near the base of the shell body projecting slightly so as to engage the rifling of the gun; (3) a base plate inserted into the bed of the shell to prevent premature discharge; (4) a nose bushing of two parts, one of which screws into the shell body and the other into the fuse; (5) the fuse, either time or percussion, a complicated piece of mechanism screwed into the nose bushing; (6) the high explosive charge.

Petitioner made its return for the year ending December 31, 1916, showing a net profit from these contracts of \$862,774.71, and on this amount it paid, without protest, a tax of \$107,846.84, which is not now in dispute.

Later, however, upon an examination of its books, its net profits were found to have, in fact, been \$1,975,361.47 more than the amount shown by its return. This additional profit consisted of two items arising from the amounts which it had deducted as the cost of raw material. In making its return, it had deducted from the gross income not the actual cost to it of manufacturing the steel used, but what was conceived to be the market value of the steel bars after being manufactured. In this way, it deducted \$754,620.88 in excess of what the steel bars had, in fact, cost. Likewise, when it contracted with other companies to do the forging work on the steel bars which it had manufactured, it included in the amount deducted as cost of raw material—not merely what the manufacture of these bars had cost but what it claimed was their market value after manufacture—and thus increased the amount deducted as cost of raw material \$1,220,740.59. These two items make up the additional profits of \$1,975,361.47, on which the tax now involved was assessed.

The only questions involved are whether the petitioner was, during the year 1916, a person manufacturing unloaded shells, or any part of such shells, within the meaning of the act, and if so

whether it is entitled to deduct from the price realized what the steel used by it actually cost, or what such steel might have been sold for in the market at the time it was used.

THE CONTENTIONS.

The petitioner contends that only a person who turns out complete and ready for use a shell, or some definite article which, without more work on it, is ready to be used as a component part of the shell, is liable for the tax.

The Government contends that where two persons act together in the manufacture of shells, one conducting the manufacture up to a certain stage, and the other finishing it, they are both manufacturing the shells and each is liable for a tax on the profits derived by him.

BRIEF.

It is respectfully submitted that the writ should be denied because there are no conflicting decisions to be reconciled, and the question to be presented is not one of such gravity, general importance, or doubt as to require this court to assume jurisdiction.

I.

There are no conflicting opinions by the different Circuit Courts of Appeals. This case and another decided at the same time, and in the same way, are the only cases which have as yet been decided by a Circuit Court of Appeals. It is not to be assumed that any other court will hereafter render a conflicting opinion. Certain it is that there are not now conflicting opinions to be reconciled.

II.

The tax in question was in effect only in the years 1916 and 1917. Only the comparatively few persons or companies engaged in the manufacture of munitions were affected by it. It appears from the appendix to the petition that, except this case and two others decided at the same time, one of which does not involve the present question, only two other suits involving this tax have been commenced or are now pending in any court. These two cases are both pending in a District Court in Ohio and together involve only about \$25,000. It does appear in the same way that a considerable number of claims have been filed with the Commissioner of Internal Revenue, some of which are undetermined and others of which have already been rejected. Whether these claimants will acquiesce in the ruling of the Circuit Court of Appeals in this case and prosecute their claims no further, this court has no means of knowing. It can not, therefore, be said that the question involved is one of general importance. It is, of course, of importance to the petitioner, as every lawsuit involving large amounts is important to the litigants. It certainly is not important to the Government to have this decision reviewed nor is it a matter of interest or importance to the general public. The object of creating the Circuit Court of Appeals was to relieve this court of some of its burdens by making the decision of that court final in just such a case as this unless it appears that the decision is plainly erroneous.

III.

The decision in this case, it is submitted with all respect to opposing counsel, is so plainly right that it can not be said to involve such doubt as to require this court to entertain jurisdiction.

(1) The shell forging which the petitioner manufactured was, after another company had done the machining and finishing work on it, the body of the shell which became a part of the shells delivered to foreign Governments. It is admitted that this shell body was a part of a shell in any possible sense that that word can be used. The tax is laid, and was collected on the actual profit derived by the petitioner. The shell body was not completely manufactured by either of the companies which were engaged in its manufacture. The first stages of the manufacture were just as necessary and just as much a part of the manufacture as the last. Every stage of manufacture was subject to the specifications set out in the contract with the foreign Government, and was conducted under the inspection of that Government. The shell body was in fact partially manufactured by each company—that is, it was manufactured by the two acting together. The profit derived from the sale was the aggregate amount of profit derived by both. The profit of the company for whom the petitioner partially manufactured these shell bodies was the sale price of the shell, less the cost of manufacture, including what it paid the petitioner for its share of the manufacture. This latter item of course included the profit derived by the petitioner, and hence this

profit is not included in the profit on which the other company was taxable and unless taxable to the petitioner escapes taxation altogether.

(2) An examination of the act shows that the tax is not laid on *shells or parts thereof* nor on *manufacturers who sell shells or parts thereof*, but on *every person manufacturing shells or parts of shells*, and who derives a profit from their sale or disposition. The language is unusual and significant. The word "manufacturing," as here used, is the participle of the verb "to manufacture," and is defined as "engaged in manufacture" (Murray's New English Dictionary). When it is remembered that the act was passed in view of the fact that few, if any, manufacturers carried either shells or their component parts through all stages of manufacture, the language quoted would seem to have been used designedly to make impossible the very construction now urged by petitioner. If the tax had been levied simply upon the manufacturers of shells, or parts thereof, it might be said with some force that only those turning out completed articles were liable for the tax, but it is laid on every person engaged in their manufacture. Those conducting the first stages of the manufacture are just as much engaged in the manufacture as those conducting the last. The manufacturer of a rough shell forging which finally becomes a shell body is as much engaged in the manufacture of that shell body as those who do the necessary machining and finishing. In this case there was a sale of shells to be there-

after manufactured. As a result of this sale the petitioner manufactured the shells up to a certain stage and disposed of them at a profit to the company which completed the manufacture. Each was engaged in the manufacture, and each derived a profit from the disposition of the manufactured article.

(3) There is very ready agreement with the rule quoted by counsel that revenue laws—

are designed to operate upon the public at large, and are supposed to use words in the sense belonging to the familiar language of common life and commercial business.

The Government is entirely willing to submit the act in question to this test, and to let the case depend upon what would be understood in common life and commercial business by the expression "every person manufacturing," etc. In common life and commercial business would this expression include only the manufacturer who happens to put the finishing touches on an article, or would it include all persons who have been engaged in the manufacture of such article at any stage of its manufacture? How this expression would commonly be understood is of unusually easy solution in the present case. The petitioner is controlled by officers of intelligence and a thorough understanding of the business in which they are engaged. In passing the act Congress spoke to them and used language in the sense in which it would commonly be understood in their business. No better test can be applied than by

giving the language used the construction which they themselves gave it. It appears that they understood so plainly that they were manufacturing shells, or parts of shells, that they paid taxes under this very act to the amount of more than a hundred thousand dollars without a murmur or a protest, and as a matter of course. It was only when the Commissioner of Internal Revenue discovered that they had figured their profit on a basis by which they escaped the payment of some two hundred and fifty thousand dollars of taxes, for which they were liable, that any question was raised. The petition states that the advice of counsel was then, for the first time, asked. The result is that the construction upon which the Government insists is that which intelligent men engaged in that line of business themselves put upon the "familiar language of common life and commercial business" employed. On the other hand the construction upon which the petitioner now insists is one that did not occur to such men, but which originated only in the ingenuity of skilled and trained lawyers.

(4) The cases dealing with articles, or parts thereof, under tariff laws, are wholly inapplicable. Such laws levy taxes upon materials in various stages of development, upon finished articles, and upon specific parts of such articles. The question usually arises as to whether a particular article is to be taxed as a material which may be used for various purposes, as a finished manufactured article, or as a component part of such article. Here, however, no tax

is laid on the article itself, nor is it laid upon the manufacturer who turns it out complete, but upon every person engaged in its manufacture and making a profit from its disposition. It may be said that a rough shell forging is not a component part of a finished shell until it has been machined and finished, but when it is finished it is a part of a shell and every person who has done any part of the work necessary to produce and finish it has been engaged in its manufacture. One begins the work and partially manufactures it. The other takes it at this stage and completes it. It has then been completely manufactured by being partially manufactured by each.

(5) The cases of *Burdon Central Sugar Refining Co. v. Payne*, 167 U. S. 127; *Allen v. Smith*, 173 U. S. 389; and *Tidewater Oil Company v. United States*, 171 U. S. 210, cited by counsel, are no more applicable than the tariff cases. The first two cases dealt with the act granting a bounty to the producers of sugar. The court simply held that the raiser of the cane was not the producer of the sugar. The third case dealt with the right to a drawback on account of box shooks claimed to have been manufactured *wholly in the United States* from materials brought into this country upon which the duty had been paid. The court found that these box shooks, as they were finally exported, had been partially manufactured before they were brought into the United States, and hence could not be said to have been wholly manufactured within the United States. If this case has any bearing on the present case it is decidedly

in favor of the Government. It clearly recognizes that there is such a thing as a partial manufacture. After one has manufactured an article, which, without more, is suitable for use as a component part of some other article, there has been a complete manufacture. If, however, an article has been produced by the combined work of two persons neither can be said to have completely manufactured it, but it has been produced by the partial manufacture of each. If there is such a thing as a partial manufacture of an article, then one who is engaged in its partial manufacture is necessarily one of the persons engaged in its manufacture. This brings the petitioner clearly within the act under consideration.

IV.

If the petitioner was engaged or concerned in the manufacture of shell bodies there can be no serious doubt that the amount upon which the taxes collected were based was, in fact, the amount of its profit. As shown above, it paid without protest the tax upon the amount of profit shown in its return. The taxes now involved were laid on the profits shown by an amended return which it was required to make, and consisted of two items. Its forgings had been made from steel bars of its own production, and the cost of this production was a fixed and definite amount. Instead of deducting this amount, however, it placed what it called a market value on these bars and by deducting this it increased the amount of the deduction, where the forgings had been made in its own

plant, \$754,620.88, and where it had employed other companies to make the forgings, using bars of its own manufacture, to the extent of \$1,220,740.59. By this means, if its original return had been accepted, it would have escaped taxation on \$1,975,361.47 of profits actually derived from its part in the manufacture of these shells.

Undoubtedly if a manufacturer of shell forgings goes into the market and buys steel bars the amount which he pays for them must be deducted as a part of the cost of production. If, however, he is equipped to make the steel, and prefers to do this, to the extent of the difference between the cost of making it and what it would cost to buy it in the market, he increases the profit which he derives from the manufacture. If he buys the bars, and is thus content to make a smaller profit, he pays a smaller tax. If he prefers to make more profit, and therefore produces his own steel, it is but fair that he pay a larger tax. Whichever method he adopts he is entitled to deduct from the price realized what his material and labor have cost him and no more. The act in section 302 sets out the items which may be deducted, and the only one at all applicable is the item of "the cost of raw materials entering into the manufacture." This means, of course, what they have actually cost the manufacturer and not what they might have cost somebody else. If the manufacturer has purchased the materials, their cost is of course what he paid for them. On the other hand if he has manufactured them himself, it is equally plain that their cost is

necessarily what it has cost him to produce them. Certainly, there is no room here for including as a deduction the profit he might have made by selling them instead of using them in the manufacture of munitions. If he chooses to deal with them commercially and sell them on the market, his profit—the difference between the cost of production and the selling price—is a profit which he derives as a manufacturer of steel bars, and on this Congress has not seen fit to impose this tax. If, however, instead of dealing with them commercially he chooses to use them in the business which Congress has taxed, he has chosen to derive his profit from a business upon which this tax is imposed. He has his choice. If he is content with the profit that can be made by selling the bars he escapes this tax, but if he finds it to his advantage to merge the untaxed profit into the large profit which may be derived from using the steel bars in the manufacture of munitions, he must follow the explicit directions of Congress and deduct only the actual cost of producing the bars.

It is respectfully submitted that the writ should be denied.

WILLIAM L. FRIERSON,

Assistant Attorney General.

SEPTEMBER, 1919.



FILED

DEC 22 1919

JAMES D. EARL

IN THE

Supreme Court of the United States

NO. 526 OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, Petitioner,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for Twenty-
Third District of Pennsylvania, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals
for the Third Circuit, at No. 2462 March Term, 1919.

BRIEF FOR PETITIONER

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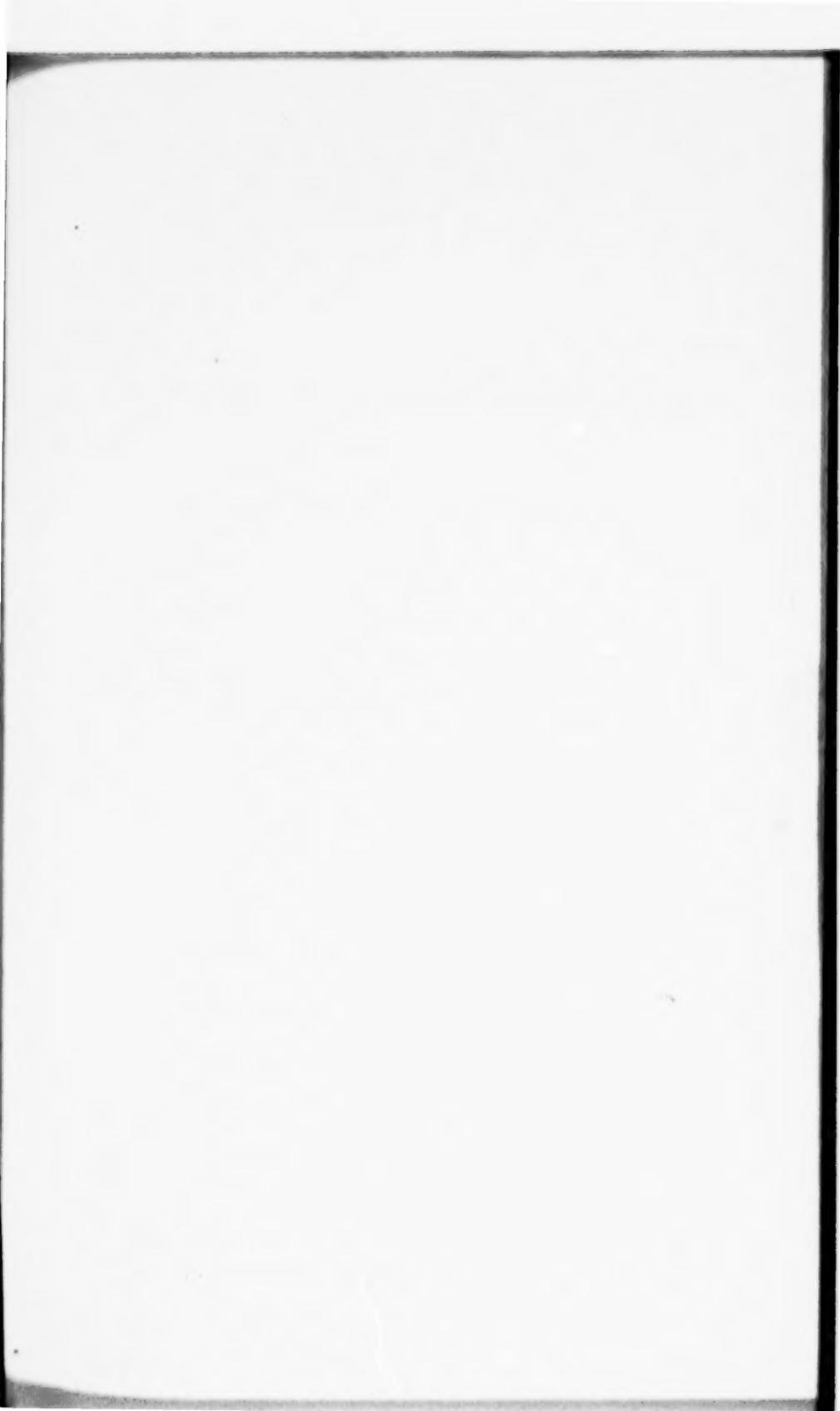
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IN THE
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No. 526 OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, Petitioner,

vs.

C. G. LEWELLYN, Collector of Internal Revenue for Twenty-
Third District of Pennsylvania, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals
for the Third Circuit, at No. 2462 March Term, 1919.

BRIEF FOR PETITIONER.

Statement of the Case.

The case comes before this court on a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit. The writ was allowed by this court on the 20th day of October, 1919.

This was an action of assumpsit, brought in the United States District Court for the Western District

of Pennsylvania. The Forged Steel Wheel Company, a corporation of the State of Pennsylvania, was plaintiff (hereinafter called the "Steel Company"), and C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania was defendant (hereinafter called the "Collector"). The suit was brought to recover \$246,920.18, the amount of certain excise taxes exacted by the Collector from the Steel Company and paid by it under protest. Said excise taxes had been assessed under Section 301 of Title III of the Act of Congress of September 8th, 1916 (39 St. 756-781).

The case was tried before Hon. W. H. S. Thomson, district judge, and a jury, and resulted on January 3rd, 1919, in a verdict by the jury in favor of the Steel Company and against the Collector in the sum of \$263,258.06, which was the full amount of the tax collected, plus interest from the time of payment to the date of the verdict. A motion for a new trial was made by the Collector, which was denied by the court, and judgment was entered upon the verdict in favor of the Steel Company and against the Collector. The Collector sued out a writ of error to the Circuit Court of Appeals for the Third Circuit. The Circuit Court of Appeals reversed the judgment of the court below.

The Steel Company filed a petition in this court for the allowance of a certiorari, which was granted.

While this case was tried before a jury and the evidence is somewhat voluminous, there was no conflict of evidence, and there is no dispute about the facts.

The only question in the case is a question of law, to wit, the true construction of the Act of Congress, and whether, under the Act, the Steel Company was liable for the tax imposed.

The verdict of the jury in the District Court was rendered by it under the instructions of the judge to find for the Steel Company, Judge Thomson deciding, as a matter of law, that the profit which accrued to the Steel Company on the article which it manufactured was not taxable.

In the Circuit Court of Appeals that court took the opposite view, deciding, as a matter of law, that the profit on the article manufactured by the Steel Company was taxable.

The two things which it is necessary to understand in order to decide this case are:

- (a) What the article was which the Steel Company manufactured and sold; and
- (b) Whether the Act of Congress imposed a tax upon the profit made on the manufacture and sale of that article.

(a) **Description of the Articles Which the Steel Company Manufactured and Sold and its Connection with Munition Manufacturing.**

The petitioner, the Steel Company, is a manufacturing corporation. Its plant is in Butler County, Pennsylvania, and it is engaged in the manufacture of steel by what is known as the "open-hearth" process. It makes no finished products except car wheels. The

steel made by it is sold in various shapes to suit the requirements of manufacturers—sometimes in ingots, but more frequently in plates, billets, rolled shapes and forgings.

During the year 1916 the Steel Company had contracts with various projectile manufacturers, some located in the United States and some located in England, for the manufacture and sale to them of rough steel forgings. Projectile manufacturers, as a rule, are not steel manufacturers, although steel is the chief component of the projectile. It is in the shape of rough steel forgings that projectile manufacturers customarily purchase their steel.

These rough steel forgings contained steel of such a character that bodies for high explosive projectiles could be made therefrom. Each contained a sufficient quantity of steel to make one projectile body, and the steel was roughly pressed or forged into such a shape that it could be conveniently used by projectile manufacturers as material in the manufacture of the shell bodies.

The Steel Company had no connection whatever with the manufacture of the projectiles. The persons who bought the steel from it (in the shape of these rough forgings), manufactured such of the rough forgings as were not spoiled in subsequent manufacturing processes into bodies for British high explosive shells. Some of these projectile manufacturers were located in England and the projectiles were manufactured

there. Some of them were located in the United States and the projectiles were manufactured here.

The British high explosive projectile, in the manufacture of which the steel furnished by the Steel Company was used, is a composite structure composed of six principal parts:

1. A shell body.
2. A copper driving band.
3. A base plate.
4. A nose bushing.
5. A fuse.
6. The high explosive content.

Each of these parts is made separately (in fact, the fuse is made of some seventy-five different pieces), and the six parts are finally assembled together to make a complete projectile or shell; and each part has to be complete in itself in order to be so assembled.

Each rough forging sold by the Steel Company weighed about 170 pounds. The shell body which was made from it weighed 77.45 pounds; that is to say, 55% of the steel was planed or bored away by the purchaser and thrown into the scrap heap.

The rough forging when sold by the steel company was worth \$8.50. The shell body which the purchaser made out of it was worth \$20.00. When the steel company sold the forging, \$6.00 represented the value of the steel contained therein and \$2.50 represented the value of the work done in forging it into

the particular shape. The projectile manufacturer afterwards put \$11.50 worth of work and labor on this material in order to manufacture from it a part of a shell.

(b) **The Act of Congress.**

The tax in question was imposed by Title III of the Act of Congress of September 8, 1916 (39 St. 756-780), and particularly Section 301.

This portion of the Act of Congress is generally known as the "Munition Manufacturers" Tax Act, although it does not tax all munitions and does tax things which are not munitions. It imposes upon every manufacturer a tax of 12½% upon the net profits received or accrued from the sale or disposition of projectiles and certain other specified articles manufactured by him, or any part of any of said articles.

Said section is as follows:

"SEC. 301. (1) That every person manufacturing (a) gunpowder and other explosives excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats submarine or sub-

mersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: Provided, however That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."

The whole of Title III is printed in an appendix to this brief, p. 110. The Steel Company had made a return and had been assessed and had paid a tax of \$107,846.84 on the profit made by it in forging the steel. That tax was not paid under protest and is not involved in this case, although it should not have been exacted by the Collector or paid by the Steel Company.

Some time afterwards an additional assessment ~~was~~ levied by the Collector upon the profit made by the Steel Company in manufacturing the steel before the forging process began and on steel purchased by the Steel Company from other manufacturers and forged ~~for~~ by other manufacturers. It was for the recovery of this second assessment, amounting to \$246,920.18, that this suit was brought.

THEREFORE THE QUESTIONS INVOLVED IN THIS CASE
ARE:

I. THE FUNDAMENTAL QUESTION, WHETHER A MANUFACTURER OF ROUGH STEEL FORGINGS WAS LIABLE TO THE TAX IMPOSED BY SECTION 301, WHERE HE SOLD THE FORGINGS TO ANOTHER MANUFACTURER LOCATED IN THE UNITED STATES OR ENGLAND WHO INTENDED SUBSEQUENTLY TO MANUFACTURE THEM INTO PARTS OF PROJECTILES, TO WIT: SHELL BODIES.

II. THE SUBSIDIARY QUESTIONS:

(i) Where the Steel Company had a contract for the manufacture and sale of steel forgings and did not manufacture them but purchased the steel from the Illinois Steel Company, had it shipped to the Standard Steel Car Company and forged, and that company delivered the forgings to the purchasers; was the Steel Company liable to a tax upon the profit made by it in this transaction, although no part of the process was performed by it and the steel was never in its shop at all, but it simply had a dealer's profit upon the transaction?

(ii) The Steel Company having already paid the tax on all the profit accruing to it from the manufacture of these forgings (that is to say, the fabrication of the steel into a forging of a particular shape), was it liable to pay a further tax on the profit it made upon the manufacture of the steel before the forging process began?

(iii) In any aspect of the case, should not the Circuit Court of Appeals have granted a new trial when it reversed the judgment of the District Court?

The case was decided by the District Court upon the ground that the profit made in the manufacture of the forgings was not taxable because the forgings were neither projectiles nor parts of projectiles. The thought of the District Court was that a manufacturer was taxable, only if what he made and sold was a substantially completed (that is to say, usable) projectile or part.

The Circuit Court of Appeals reversed the case upon the conception that any profit made from the manufacture of the forgings was taxable. Its controlling idea was the very general one that it was the purpose of Congress to tax all profits made in doing manufacturing work that entered into munitions and that it was immaterial that the Steel Company did not make any of the articles mentioned, but simply produced material for a customer who did make from it the specific thing designated in the Act as taxable. We contend that this is a wrong and misleading conception. But even if the view taken by the Circuit Court of Appeals were correct, it is submitted that there was a question for the jury under points (i) and (ii) and that the Circuit Court of Appeals had no power to make final disposition of the case by simply reversing the judgment of the District Court.

Specifications of Error

FIRST. The United States Circuit Court of Appeals for the Third Circuit erred in entering the following judgment against the petitioner:

"This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed."

(See Transcript of Record, p. 171.)

Said judgment recovered by the petitioner in the United States District Court for the Western District of Pennsylvania, the court below, was as follows:

"Now, March 1, 1919, judgment is hereby entered on the verdict in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, in the sum of two hundred and sixty-three thousand two hundred fifty-eight dollars and six cents (\$263,258.06)."

(See Transcript of Record, p. 156.)

SECOND. The said United States Circuit Court of Appeals for the Third Circuit erred in not affirming

the judgment of the District Court of the United States for the Western District of Pennsylvania, which judgment was as follows:

"Now, March 1, 1919, judgment is hereby entered on the verdict in favor of the plaintiff and against the defendant, C. G. Lewellyn, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, in the sum of two hundred and sixty-three thousand two hundred fifty-eight dollars and six cents (\$263,258.06)."

(See Transcript of Record, p. 156.)

THIRD. The said United States Circuit Court of Appeals erred in holding that the petitioner, the Forged Steel Wheel Company, was taxable under Section 301 of Title III of the Act of Congress of September 8, 1916 (39 Stat., 756, 780) on the profits made by it from manufacturing and selling rough steel forgings which the purchasers used as material in making shell bodies of projectiles.

FOURTH. The said United States Circuit Court of Appeals erred in reversing the judgment of the District Court without granting a new trial for the reason that even if the construction placed upon the statute by the said Circuit Court of Appeals is correct, there was a mixed question of law and fact which should have been submitted to the jury as to whether or not that portion of the plaintiff's claim which was for a refund of the tax paid upon the profit of \$1,220,740.59 which was made by the petitioner upon forgings which it sold where it had not done the forging nor manufactured the steel and where the steel had never been in its shop at all;

that is to say, whether the steel which was purchased from the Illinois Steel Company and delivered by it to the Standard Steel Car Company and forged by that Company was taxable.

FIFTH. The said United States Circuit Court of Appeals erred in reversing the judgment of the District Court without granting a new trial, for the reason that even if the construction placed upon the statute by the said Circuit Court of Appeals is correct, there was a mixed question of law and fact which should have been submitted to the jury as to whether or not that portion of the plaintiff's claim which was for a refund of the tax paid upon the profit of \$754,620.88 which was made by the petitioner in manufacturing steel before the forging process began was taxable.

SIXTH. The judgment entered by the Circuit Court of Appeals, reversing the judgment of the District Court without granting a new trial, was beyond the power of said Circuit Court of Appeals, and was an infraction of the seventh amendment to the Constitution of the United States, to wit, the right of trial by jury according to the rules of the common law.

Brief of Argument.

This case in the Circuit Court of Appeals is reported in 258 Fed. Rep. 533.

THE FUNDAMENTAL QUESTION INVOLVED.

The fundamental question for determination in this case is whether rough steel forgings, manufactured by the Steel Company in 1916 and sold and delivered by it to the Baldwin Locomotive Works and other persons, were projectiles or parts of projectiles within the meaning of Section 301 of Title III of the Act of Congress of September 8th, 1916, C. 463, 39 Stat., 781; U. S. Compiled Statutes, 1918, Compact Edition Sec. 6336-1/4 b., which levies what is sometimes called the Munition Manufacturers' Tax. A copy of the whole of Title III is printed as an appendix to this brief (p. 110). Said Section 301 reads as follows:

“SEC. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kinds and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, sub-

marine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: *Provided, however,* That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."

It will be observed that every person who *manufactures a projectile or any part of a projectile* shall pay an excise tax of $12\frac{1}{2}\%$ upon the entire net profits actually received or accruing to it *from the sale of projectiles or parts of projectiles* manufactured *within the United States*.

The questions that have to be decided in this case are:

What was it that the Steel Company made and sold?

Was it a projectile?

Was it a part of a projectile?

SUMMARY OF POINTS.

1. What the Steel Company manufactured and sold, upon the profits from which the tax was based, was rough steel forgings, which the purchasers afterwards used as material in the manufacture of parts of projectiles known as shell casings.
2. These rough steel forgings are not projectiles.
3. These rough steel forgings are not parts of projectiles.
4. The rough forgings, from the manufacture and sale of which the Steel Company made the profits taxed, were the projectiles manufacturers' raw materials.
5. The Circuit Court of Appeals erroneously based its decision in part upon the idea (though not specifically laid down as a proposition) that, because the Steel Company did work of a manufacturing kind the results of which entered into the shell bodies subsequently manufactured by other persons from the rough forgings, the Steel Company was engaged in the business of manufacturing shell bodies and was taxable. The reason given was that in manufacturing this raw material the company was partially manufacturing shell bodies; and the court then confused partial manufacturing with the manufacture of a part.
6. The theory upon which the Circuit Court of Appeals decided the case is also in direct opposition to the words of the Act, in this:

- (a) The Act mentions certain specific articles and over and over again refers to "the articles mentioned"—a clear and specific declaration that no other articles are included.
- (b) Congress itself had rejected the proposition to tax the manufacture of materials used in the manufacture of any of the articles enumerated.
- (c) The theory of the Circuit Court of Appeals renders nugatory what Congress said about "parts."

7. The Act of Congress, when its essential words are given the interpretation for which we are contending, has a natural application to a great number of commodities, and no necessity exists for extending the meaning of the words, by any doubtful construction, with a view to finding subjects for its operation.

8. The intent of Congress is to be derived from the meaning of the words used to express that intent, and that meaning when ascertained, not only determines the meaning of the statute, but the intent of Congress in passing it.

9. Revenue laws "are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business."

10. In every case of doubt, such revenue statutes are construed most strongly against the government and in favor of the subjects or citizens.

11. The fundamental idea of a manufactured article is that it must be so nearly completed as to be serviceable for the purpose for which it was designed.

12. Under the authorities a part of a thing means a substantially finished part.

13. The Government's contention.

A. That the cases cited by us are not controlling because they are import duty cases while this tax is not on the article but on the business. There is no such distinction in the cases.

B. The contention that the Act was intended to cover profits made in the manufacture of all munitions is unfounded.

C. The attempted distinction between the tax as a duty upon articles or parts and the tax as an excise tax upon the business of manufacturing articles or parts.

D. There was no partnership or joint relationship in this case between the Steel Company and the projectile manufacturer, or any subletting of a contract.

14. The Steel Company has been unlawfully taxed on the profits made on the sale of forgings which were not manufactured by it.

15. The Steel Company has been unlawfully taxed on the manufacture of steel before the forging process had been begun.

16. In violation of the 7th amendment of the Constitution of the United States, the Circuit Court of Appeals set aside the judgment without sending the case back for a new trial.

WHAT THE STEEL COMPANY MANUFACTURED

The Steel Company is a manufacturer of steel, and what it manufactured and sold was a rough steel forging, which was subsequently manufactured by another person into a part of a projectile known as a shell casting or body.

The Steel Company's manufacturing begins with the smelting of pig iron, scrap and other necessary ingredients in open hearth furnaces (Record, p. 44). After these materials have been converted into steel it is cast into ingots. The ingots are then rolled into billets, blooms, slabs, or rounds. The steel is sometimes sold in this condition. Sometimes the process is carried further by rolling them into small rounds, squares, angles, Z-bars, or other shapes, and sometimes they are pressed into forgings and the steel is sold in that shape (Record, p. 44 at the bottom). The Steel Company makes no finished articles of any kind except car wheels (Record, pp. 44 and 45).

In the year 1916 the Steel Company had contracts with various persons, some of them located within the United States, such as the Baldwin Locomotive Works, the American Brake Shoe & Foundry Company and the J. G. Brill Company, and some of them abroad, such

as the Kingdom of Great Britain and J. P. Hill & Company. By these contracts it agreed to manufacture, sell and deliver to the purchasers certain quantities of rough steel forgings, ordinarily denominated in the contracts as shell forgings, which were to comply with the specifications imposed by the British Government upon the manufacturer of high explosive projectiles. These specifications, in so far as they were applicable, were in turn imposed upon the manufacturer of the rough steel forgings supplied to such manufacturer; that is to say, as to the chemical constituents, strength, etc., of the steel, and as to the size, shape and freedom from mechanical defects of the rough forgings, so that the forgings would pass British inspection as materials proper for use in the manufacture of high explosive shells.

The method of the manufacture of these forgings was to roll the ingots into what is known as steel rounds, approximately 6.9 inches in diameter (Record, p. 45). There was nothing peculiar about the steel itself. It was an ordinary grade of steel such as could have been used for a hundred different purposes (Record, pp. 72 and 73); neither was there anything out of the ordinary in this manufacture, or cost, or value.

The Steel Company took these steel rounds and put them in a lathe and nicked them, that is, cut circular grooves around them at a distance of 18 inches apart; then it placed them under a hammer and broke them at the nicks into pieces so that each piece of steel was of the necessary diameter and length to contain at least the amount of metal required in each forging

(Figure 1, Exhibit K; Exhibit N-1—between pp. 92 and 93 of Transcript of Record.) The piece was then heated and put through two forging operations in hydraulic presses. The first was a pressing operation by which a hole was pierced in one end to a point within about two inches from the other end; the second was an operation by which the piece of steel thus pierced was elongated by drawing it through three successive rings in a hydraulic press, so that it left the steel in the shape of a cylinder open at one end and closed at the other. The piece of steel in this shape might be compared with an umbrella stand or straight flower pot, and contained about 170 pounds of steel (Record, p. 47).

A fair idea of it may be obtained from the Plaintiff's Exhibits K and N-2, which are reproduced in the printed record between pages 92 and 93. It is interesting to contrast these with a finished shell body (See Plaintiff's Exhibit N-5, to be found at the same place in the record.) It was these rough steel forgings which were manufactured and sold by the Steel Company. And it was the profit made in the manufacture and sale of the steel contained in them that part of the tax was assessed upon; the remainder of the tax was assessed upon the profit the Steel Company made on the sale of forgings manufactured by others.

THESE ROUGH STEEL FORGINGS ARE NOT PROJECTILES.

Let us get a clear idea of what a high explosive projectile or shell is.

A high explosive projectile or shell (such for example as a six-inch shell) is a very carefully manufactured article, brought to a very high finish by the most careful machine work, so true to design as to admit of no deviation; and is composed of many parts assembled together by mechanical processes.

One of these composite structures consists of the following distinct and essential parts:

1. The shell body in one piece.
2. A copper driving band set near the base of the shell body and projecting slightly beyond it to engage the rifling of the gun.
3. A base plate screwed or dove-tailed into the base of the shell to prevent premature discharge of the high explosive content.
4. A nose bushing.
5. A fuse screwed into the nose bushing, which is either time or percussion, or both.
6. The high explosive charge or content.

As stated, the shell is a highly developed, carefully and accurately fabricated composite structure, every part of which, assembled together as a whole, is necessary to constitute it a shell; that is, to make it at all available as such.

The shell body is the largest and most substantial part in respect of size and weight. It is cylindrical in shape up to the head, where it is made pointed with what is called the ogival head. The point or ogival head is given to all modern projectiles. The reason for making it pointed in this way is to decrease the air resistance in the flight of the projectile and to increase its penetration when fired against armor.

The copper band is the second part. It is inserted in the body of the shell near the base in order to give the rotary motion necessary for precision in flight. The band has a diameter slightly greater than the caliber of the shell body. When the cannon is fired the explosion forces the band to conform to the lands and grooves of the rifling. This not only assures proper rotation, but the soft band is thereby made to fill the entire cross section and therefore to act as a gas check which prevents the powder gases from escaping around and in front of the projectile. This copper rotating band is put on the shell by forcing it into an undercut groove, cut around the projectile near the base. Longitudinal or irregular grooves are made in the seat for the copper band to prevent its rotating separately from the projectile.

The base plate is either of lead and copper calked into an undercut groove at the base of the shell or of steel screwed into the base of the shell. Its purpose is to prevent the danger of premature explosion of the projectile in case there should be some piping or flaw in the metal base of the shell body.

The nose bushing is a machined piece made of two forgings, one of which screws into the shell body and the other into the fuse.

The fuse is screwed into the nose of the shell. The fuse is a complicated piece of mechanism, composed sometimes of as many as 75 pieces (Record, pp. 63, 66). It may be a time fuse, a percussion fuse, or a combination of the two. The first kind of fuse will explode after the projectile has traveled for the number of yards to which it has been set by the gunner. A percussion fuse is one that will explode when the projectile strikes some solid matter. The combination fuse is a combination of these two kinds, and insures the explosion of the shell when it strikes or when it has traveled a certain designated distance, whichever happens first.

The high explosive content needs no description; but it is upon this beyond all else that the shell depends for its effectiveness.

Manifestly the projectile is not a projectile, unless it consists of all of these things. You could no more fire this 6.9-inch forging out of a six-inch cannon than you could fire a square six by six billet out of it.

Not only is the shell as a whole a delicately and highly finished composite piece of mechanism, but its several parts must also be delicately and highly finished as related to each other and to the whole structure, in order that they may be assembled together and in order likewise that when assembled the composite structure will serve its purpose as a shell. No one of

the parts is of any use for firing purposes without the other parts; and no one part can be associated or combined with the other parts, unless each part is at the time finished and complete with reference to its relation to the others in the finished shell structure. Thus, the shell body cannot be effectively fired without the copper band and base plate; nor would the shell body, the base plate, and the band together be a practical high explosive shell without the fuse and the high explosive content.

So also, the shell body could not have the copper rotating band or the base plate pressed into it with a view to making a complete practical shell, without carrying the shell body to a late stage of completion, and also preparing the shell body itself by elaborate machining and cutting processes for receiving the band and base plate. Likewise, the fuse could not be attached to the shell body without its being absolutely finished in all its constituent parts and without the shell body itself being developed to a full stage of completion, including the nosing and shaping of the apex and the careful threading of the shell body so that the two can be screwed into each other.

Bear in mind while reading this description that the Forge Company made only rough forgings. These rough forgings were part of the material, in convenient shape, from which the purchaser manufactured shell bodies. They were not parts of shells; and the Forge Company was not manufacturing parts of shells. A person *is manufacturing* what he makes when he completes *his* manufacturing processes (in this case rough steel

forgings—*material in convenient shape for making shell bodies*).

The purchaser, in the manufacture of shell bodies for projectiles, puts one of these forgings through 27 distinct and separate processes before it becomes a finished body of a projectile (Record, p. 68). In this manufacture its weight is reduced from about 170 pounds to 77.45 pounds; that is, 55% of the steel is planed or bored away and thrown into the scrap heap (Record, p. 64); and while the value of the 170 pounds of steel contained in the forgings was \$8.50, the value of the 77.45 pounds of steel left in the shell body was \$20.00 (Record, p. 70). In other words, when the Steel Company sold this forging, \$6.00 represented the value of the steel contained in it, and \$2.50 the work done in forging it into the particular shape (Record, p. 71). The projectile manufacturer afterward put \$11.50 worth of work and labor on it in order to manufacture it into a part of a shell.

To accomplish this 27 distinct processes are required so that the shell body may have an exact size both in exterior and interior, the variation admitted being only a few thousandths of an inch. The shell body must, when finished, have an exact weight. Its exterior and interior must both be absolutely centered or true to the longitudinal axis of the shell. The thickness and weight of the material must be absolutely and accurately distributed to its proper place, so that each shell body shall be exactly like all the others; otherwise they would not "fly" the same, the time fuse would be ineffective, and they would be dangerous to use in a barrage.

In fact, the rough steel forging and the finished shell body are so unlike that it is apparent upon inspection that they are not the same thing at all; that the one is simply a lump of steel from which the other is made by a long, complicated, and expensive mechanical process, involving the highest degree of skill and care.

THESE ROUGH STEEL FORGINGS ARE NOT PARTS OF PROJECTILES.

Upon a mere inspection of the rough forging and a comparison of its form and stage of development with the shell body itself as finished after the material goes through the later processes, it is quite obvious that the rough forging could not be treated as a part of a shell in any common or ordinary sense, without going to the extent of successfully contending that the material composing it, back to the ore stage, is a part of the shell as subsequently completely manufactured. In any such consideration, one would have to bear in mind that even the very chemical constituents or mechanical arrangement of the atoms or molecules of the rough forging have to be themselves substantially changed by the annealing processes through which it is subsequently put, in order to give it the required degree of hardness and toughness.

It is essential, in determining whether a particular article constitutes a part of some other article, that one should first have a clear idea of what that other article is. In the case of a whole or complete thing, like a projectile or shell, you must start with the con-

ception of the article as a complete whole in order to be able to decide what is meant by the word "part" of it. And having thus fixed in mind what a high explosive projectile is, *it is clear that A ROUGH STEEL FORGING IS NOT A PART OF A PROJECTILE.*

A part of a thing denotes simply that which is a constituent or fraction of the whole. It is synonymous with portion, piece, fragment, section, segment, division. There is no distinction between a part and a portion; and the only distinction that we know of between a piece and a part is that the word "piece" often carries with it an idea of detachment, but ordinarily they mean the same thing, although sometimes it has become customary to use one rather than the other. You may say either a *piece* of a chair or a *part* of a chair, although you would be rather more apt to use the word *part* when you are speaking of a portion of the completely assembled chair, and the word *piece* when you are speaking of a detached leg or back. But for the purposes of this case and this statute, there is no difference between the words; and if the statute had said a piece of a projectile instead of a part of a projectile surely no man would have contended that one of these rough steel forgings was a piece of a projectile. The word "part," however, seems to be a better word to use when you are speaking of motor boats or submarines or any of the other composite articles taxed. And it must be borne in mind that Congress used a word which was applicable to all the things mentioned in Section 301 except explosives.

Now, it is perfectly manifest that Congress knew when they imposed the tax that all of the things mentioned, (except group (a), i. e., gunpowder and other explosives), that is, projectiles, torpedoes, cannon, machine guns, revolvers, electric motor boats, and submarines, were composite articles made of many assembled, completely manufactured parts; and it is perfectly manifest that this was the reason why, after they had levied a tax upon the manufacture and sale of those things, they added the words "or any part of any of the articles mentioned", except those grouped under clause (a), to wit, explosives.

Just here we must bear in mind the very clear distinction between a tax levied upon the manufacture and sale of *a part* of a thing and a tax levied upon *a partial manufacture* of the thing. The first is necessarily a tax levied upon the manufacture of the finished part; the other is a tax levied upon any stage of the manufacture of the thing. We think the general understanding of the words in the English language, as found in the definitions in the dictionaries and in those laid down by the United States judges in the decisions, may be stated in this way: A *part* is a portion taken from the whole and still retaining all the properties of the whole, except only extent; whereas *partial manufacture* (the physical thing) marks a mere stage in the development of the material toward a predestined product. We must also bear in mind that Congress was well aware of this distinction, because there are many revenue acts which levy a tax upon partially manufactured articles.

A short passage in the Metals and Manufacturers of Metals' Schedule under Sec. 1 of the present Tariff Law, the Act of October 3, 1913, Ch. 16; 38 Stat. 114, will illustrate well enough the versatility of Congress in using discriminations of this kind:

"121. Axles, or parts thereof, axle bars, axle blanks, or forgings for axles, whether of iron or steel, without reference to the stage or state of manufacture, not otherwise provided for in this section, 10 per centum ad valorem: *Provided*, That when iron or steel axles are imported fitted in wheels, or parts of wheels, of iron or steel, they shall be dutiable at the same rate as the wheels in which they are fitted."

Again, it follows inevitably that a man cannot be said to be taxable as a manufacturer of a part of a projectile unless the making of that part was carried forward by him to the same stage or point of completion to which it would have been necessary to carry it if he had been the manufacturer of the completed projectile; and that the person who manufactures a thing is he who puts it into final shape so as to be serviceable and useful for the purpose intended. What is done prior to that time can only be either (a) a partial manufacture of the article or (b) the furnishing of material which is used in the manufacture of the article.

Among all the persons whose labor and materials result in the production of an article manufactured from the primitive raw materials, that one alone is the manufacturer of the article, who makes the thing which conforms to the ultimate design to be effected.

DISCUSSION OF THE REVENUE ACT.

The Revenue Act, approved September 8, 1916, contains several titles. A portion of the Act comprising Sections 300 to 312, inclusive, is preceded by the words, "Title III—Munition Manufacturers' Tax" (see this book, p. 110). We again print the first paragraph of Section 301, which is as follows:

"That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats, or (f) any part of any of the articles mentioned in (b), (c), (d) or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such article manufactured within the United States."

Section 302 (this book, page 111) says:

"That in computing net profits under the provisions of this title for the purpose of the tax, there

should be allowed as deductions from the gross amount received or accrued for the taxable year *from the sale or disposition of such articles manufactured within the United States* (italics ours) the following items: (a) The cost of raw materials entering into the manufacture * * *."

Section 303 (this book, page 112) says:

"If any person manufactures any *article* (italic ours) specified in Section 301."

Section 304 (this book, page 112) says:

"On or before the first day of March, nineteen hundred and seventeen, and the first day of March in each year thereafter, a true and accurate return under oath shall be made by each person *manufacturing articles specified in section three hundred and one* (italics ours) to the collector of internal revenue for the district in which such person has his principal office or place of business, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income received or accrued *from the sale or disposition of the articles specified in section three hundred and one*, (italics ours), and from the total thereof deducting the aggregate items of allowance authorized in section three hundred and two, and such other particulars as to the gross receipts and items of allowance as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may require."

Section 310 (this book, page 114) imposes severe penalties, to wit, a fine not exceeding \$10,000, and imprisonment not exceeding one year, upon the persons who violate the Act in certain particulars.

It is clear that the first part of section 301 is descriptive of the PERSON who is to be taxed and the second part states WHAT he is to be taxed upon.

It is "every person manufacturing," i. e., who manufactures, certain named articles, among others, "projectiles" or "any part of any of the articles mentioned" who is taxed, that is "shall pay"

"An excise tax of 12½ per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such (said) article manufactured within the United States."

Now when you know that a projectile is a composite article composed of many parts assembled together there is no difficulty in applying the plain language of the act. The "said article" upon the profit in the manufacture of which the tax is laid is "*a projectile*" or "*a part of* *a projectile*".

It will be observed that every section is consistent with every other in its designation of the profit upon which the tax is levied. It will also be observed that Congress has used no general language whatever. It does not say that "every person who manufactures munitions" or "every person who manufactures death-dealing instrumentalities useful in war" is to pay a tax upon profits, and in this respect, as we shall show, it differs

vitably and fundamentally from the opinion rendered by the Circuit Court of Appeals. The effort of that Court has been to make taxable profits made in the manufacture of other things than the specific articles mentioned in the Act of Congress.

In Section 301 (this book, page 110) the tax is imposed upon profits that a manufacturer derives from the sale or disposition (i. e. alienation) of the specific articles mentioned which had been manufactured by him. The intent of Congress to tax only the profits from *the particular articles* is clear, because it says: "The profits from the sale or disposition of such articles." The word "articles" itself is an apt and proper word to use to limit the meaning to the things which have been designated.

Section 303 (this book, p. 112) says: "If any person manufactures any article *specified* in Section 301." So Section 304 (this book, p. 112) says: "Each person manufacturing *articles specified* in Section 301" must make a return to the collector of internal revenue setting forth the gross amount of income and the profits "received or accrued from the sale or disposition of the articles specified in Section 301."

We see therefore that the obligation imposed by Congress upon manufacturers to make returns, and the provisions that Congress made with reference to the method of calculating profits are both specifically and accurately limited by Congress to the persons who manufacture the articles specified in Section 301. We submit that it would have been impossible for Congress

to use any stronger words of limitation than the words "specified" and "article." There is no stronger word that one can use in connection with the word "article," in order to exclude other things, than to say that it is the article *specified*.

Now, having regard to the ordinary meaning of language, it is perfectly clear that the manufacturer of a projectile or any other article, is he who makes the projectile; that a thing is not a projectile until it is in such shape that it can be used as a projectile, and it is equally clear that a manufacturer of a part of a projectile is a man who has carried forward the manufacture of a part to the same stage or point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the complete projectile; that is, to a point where it is put into final shape so that it can become a part of the projectile when the different parts are assembled together in the whole thing, to wit, the projectile.

If it should be thought necessary to go any further with this line of argument, it is perfectly clear that Congress did not intend to tax the materials which were used by the person who manufactured either the whole or only part of the projectile.

In the first place, as we have already seen, Section 302 (this book, p. 111) expressly states that the manufacturer may deduct "the cost of raw materials entering into the manufacture."

In the second place, when the Act was originally in the House of Representatives, the section in question was in the following shape:

"Sec. 41. (1) That every corporation manufacturing (a) gunpowder and other explosives; (b) cartridges loaded and unloaded, caps or primers; (c) projectiles, shells or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of the articles mentioned in (b), (c), (d) or (e) shall pay for each taxable year an excise tax of ten per cent. upon its entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.

(2) And every corporation selling or manufacturing for any corporation mentioned in paragraph (1) any material entering into and used as a component part in the manufacture of any of the articles enumerated in (a), (b), (c), (d), (e) or (f) shall pay for each taxable year an excise tax of five per cent. upon its net profits actually received or accrued for said year from the sale or disposition of such material so entering into or used as a component part in the manufacture in the United States of the articles so enumerated as aforesaid." (See page 13491, *Congressional Record* for 1916.)

Sub-section (1) with some alterations constitutes the present law and we see that it contains these same words "or any part of any of the articles mentioned;" but sub-section (2) imposed a tax upon persons manufacturing for the projectile manufacturers any material entering into and used *as a component part* in the manufacture of projectiles. But this sub-section was stricken out before the bill was passed (see pp. 13492-13511).

THESE FORGINGS WERE THE PROJECTILE MANUFACTURERS' RAW MATERIALS.

There is no question but that these rough steel forgings were the shape in which the munition manufacturers ordinarily purchased their raw materials.

Mr. D. H. Ramsbottom says (Record, p. 77):

"Q. Were these forgings the ordinary shape in which the munition manufacturers bought their material at the time for steel?
A. That is my understanding, that was the case.
Q. That was your experience?
A. Yes, sir.
Q. That is the shape in which they bought from you?
A. Yes, sir."

Mr. Ramsbottom was Assistant General Sales Manager of the National Tube Works and explained that they had made between half a million and a million of these forgings, and had sold them to a large number of

munition manufacturers, both in the United States and England (See Record, p. 77).

Mr. W. D. Uptegraff, who has been connected with the Westinghouse Companies for 39 years, testified that the Westinghouse Air Brake Company had made more than a million 3-inch shrapnel (Record, p. 80) and that he had a thorough knowledge of the projectile business in the United States and Canada (Record, p. 81). He was asked (Record, p. 81) what was the general custom of the trade in the United States as to how they bought their steel, and answered:

"The contracts were generally taken by companies who did the finishing, and they bought all of the different supplies that went into making shells. *They bought the rough forgings from the forge people*, and they bought the copper tubing out of which the bands were made, from concerns like the Standard Underground Cable Company, who made copper tubing, and they bought the base plates from concerns that forged base plates, and they bought the adapters from people that made those, and so on. They bought as much as they could. It was really an assembling proposition, when you come down to it, *because it was all one man could do to look after that.*"

Mr. Bacon, who was Assistant to the President of the Forged Steel Wheel Company, states that the company entered into many contracts with different concerns, referred to on page 72 of his testimony, which were all for material in the same stage of manufacture,

that is, these forgings. They sometimes sold steel rounds to people who made the rough forgings, who, in their turn, sold the forgings to the munition manufacturers (Record p. 72).

All this was done in the utmost good faith and in the ordinary course of trade. At the time these contracts were made and this custom grew up there was no Act taxing munitions, so that it is not possible for any one to make the *innuendo* that this was done in order to evade any tax.

There is no special significance in the fact that the projectile manufacturers bought their steel after it had been fabricated or forged into such a shape as to make it convenient for their purpose, even though by so doing it was not useful for any other purpose. It was fully explained in the testimony in the Worth Case that it was the custom of all manufacturers under modern conditions to purchase their material roughly shaped to suit their convenience and special purposes. (See Record in No. 525, p. 30.)

Neither is there any significance in the inspection by British Government employes. The railroads and everyone else who is particular about quality does the same thing (Record p. 51).

IN THE REGULATIONS OF THE DEPARTMENT OF INTERNAL REVENUE THE ACT HAS BEEN CONSTRUED IN ACCORDANCE WITH OUR CONTENTION.

In Article II of the regulations (T. D. 2384) the Commissioner of Internal Revenue says that the tax is in addition to the income tax and "is an amount equivalent to 12½% of the entire net profits received or accrued to every person from the *sale* or disposition of such of the following named *articles* as are *manufactured* in the *United States* by *such persons*." He says "Projectiles as used in this title include any and all missiles to be projected from a gun," et cetera. He refers again in Article III to the persons who may have been engaged "in the business of *manufacturing* and *disposing* of such articles" (the Department comes naturally by the use of the word "articles," for they get it from the Act of Congress).

Article V, which relates to the contents of the annual return, refers to the cost of raw materials entering into the manufacture of munitions or parts of munitions and also amortization of the cost of machinery specially constructed or installed for the manufacture of munitions or parts of munitions. All the way through these rulings you will note that the Department refers to munitions and parts of munitions as quite distinct things, just as the Act of Congress does.

Article X, which relates to gross income, speaks of the amount received from the sale or disposition of

the *articles* named in Section 301 and the exemption of expenses incident to the manufacture of the *articles*.

The Commissioner of Internal Revenue grasped the fact that the Act did not cover all munitions, for in Article XII he refers to net profits from the sale or disposition "of *any* munitions *enumerated* in Section 301 or any parts of the *articles* mentioned."

The Commissioner realized that the tax had to be paid on the articles mentioned, whether they were munitions or not. He says: "The fact that any of the articles named in Section 301 are manufactured and sold or disposed of in the general trade, to be used for sporting purposes, or for any purposes other than industrial, will not exempt from liability to the tax."

When the contention was made before the Department that as the title of the act is "The Munition Manufacturer's Tax," the tax could only be assessed upon profits derived from munition orders, and not from profits derived otherwise, the Department ruled to the contrary, saying that the tax was "on the profits of *the manufacturers of the articles* therein mentioned," regardless of the use to which they were put, and that the profits derived from anything mentioned therein, "even though they are sold for sporting or other purposes only in the United States in the regular course of domestic business of the manufacturer" were taxable. The Commissioner goes on to say: "In fact, except in the Title, that Act nowhere mentions munitions, and imposes the tax on *the manufacturers of certain articles*, regardless of the purpose for which they are used, with the exceptions noted." (Record, p. 145).

Then realizing that "any part" was something different from the whole and needed to be defined, he proceeded to define it. He defines it just exactly as we have contended it should be defined and as Judge W. H. Seward Thomson defined it in the instant case and as all the cases in the books have always defined it,—as a completed part—as follows (Record, p. 87) :

" 'Any part thereof,' as used in Section 301 of this title, is any article *relatively complete* (italics in the original) within itself and designed or manufactured for the special purpose of being used as a *component part* (italics ours) of a completed munition."

Under Article XIV he refers to the articles enumerated, and in Article XV, when he comes to define raw material, he says that "any *crude* or elemental products or substances necessary to the manufacture of such parts, and which, *without the application of skill or science*, cannot become *component* parts or elements in the *finished* article or unit."

And so, you see, the Department has reached exactly the same conclusion on munitions that we contend for, that is, that an *article* is a finished article; that a *part of an article* is a finished part of an article, and that *material* is anything that a man who makes the finished article or part buys, and himself manipulates or changes into the article which is to be produced. (We do not mean to claim that some rulings of the Department have not been inconsistent.)

Again, if this construction of the Act, that any one is taxable who is in the munitions *business*, is the correct one, a person who is engaged in the business of *repairing* munitions would be subject to the tax, whereas it is manifest they are not, and the Department has always so ruled.

"Those manufacturers who make repairs on munitions, either for the United States Government or as regular commercial work, will not be subject to the munitions tax, provided the repairs so made are bona fide repairs and do not involve the manufacture and sale of a *completed part* of a munition." (Record, p. 140).

THE CONSTRUCTION PLACED ON THE ACT BY THE DISTRICT COURT.

The case was tried in the court below before District Judge W. H. S. Thomson and a jury. After the evidence had been closed Judge Thomson instructed the jury to find for the Steel Company. His oral charge begins on page 89 of the Record.

A motion for a new trial was made by the Collector and after this had been argued Judge Thomson wrote an opinion refusing the new trial and directing judgment to be entered on the verdict. This opinion begins on page 149 of the Record. Judge Thomson had a thorough grasp of the facts. The Steel Company had no interest whatever in the contracts for the manufacture of projectiles. Persons who had made contracts

for the manufacture of projectiles or who intended to manufacture projectiles for their own use (e. g. the British Government) contracted with the Steel Company, who was a manufacturer of steel by the open hearth process, for the purchase of rough steel forgings, which the purchasers intended to convert into shell bodies. Judge Thomson states the question this way (Record, p. 151) :

"In considering the Act, in order to avoid confusion and in the interest of clearness, I will for the moment treat it as though it dealt with projectiles alone. It is entirely clear that the tax is laid on the manufacturer who makes and sells projectiles or parts of projectiles; and the measure of the tax which he is required to pay is 12½ per cent. on the net profits received from the sale of such manufactured projectiles or parts of projectiles. It is not contended by the Government that the plaintiff ever manufactured any projectiles. The claim is that it was manufacturing a part of projectiles, and is therefore liable for the tax. The sole question, therefore, is, was the thing which the plaintiff manufactured, a part of a projectile within the meaning of the Act of Congress? If not, it is not liable for the tax in question, because it is not manufacturing the thing the net profits from the sale of which, is made taxable under the Act. It seems clear, therefore, that the decisions which deal with manufactured articles and parts thereof, and articles *partially* manufactured, are applicable and important in interpreting this statute. As much so, as if the tax were laid upon the thing itself, because it is only to those who

manufacture and sell the designated thing, that the statute is applicable at all. There is an evident distinction between a partial and a complete manufacture."

After discussing the authorities, Judge Thomson says again (Record, p. 153) :

"Thus the distinction between a completely and a partially manufactured article, is reasonably clear. What is meant by a part as used in the Act of Congress? Generally speaking, a part of a thing denotes a constituent or fraction of the whole, being synonymous with portion, piece, section, segment or division. A part is a portion taken from the whole and still retaining all the properties of the whole, except only extent; while, as said by Justice Brown, 'a partial manufacture is a mere stage in the development of the material toward an ultimate or predestined product.' The word 'part' as used in Section 301, I think, was well chosen, and that its meaning is not obscure. We must assume that Congress knew well the distinction between a completely manufactured thing, or part of a thing, and a partial manufacture of that thing. Many revenue acts have levied a tax upon manufactured articles or parts thereof, and others have levied a tax upon a partial manufacture. In addition to projectiles, referred to in the Act, most of the articles mentioned therein, as torpedoes, cannon, machine guns, motor boats and submarines, are composite articles made up of many separately manufactured parts. On the profits from the manufacture and sale of these composite things, speci-

filed in (b), (c), (d) and (e), the tax was laid: Congress then adding the words 'or any part of any of the articles mentioned.'"

Again (Record, p. 154):

"In the case at bar, when the plaintiff cut the shell lengths from the steel rounds, and subjected them to two forging processes, piercing and elongation, the shell body was not manufactured, but there was a partial manufacture thereof. Having only partially manufactured the shell body, can it be said that the plaintiff manufactured and sold a part of the shell? On no other theory can the tax be levied. The Act is limited in its scope. Many persons may do manufacturing work on projectiles, who are in no sense subject to the tax.

And again (Record, p. 155):

"That Congress did not intend to tax the raw material entering into the finished product, is conclusively shown by the fact that to the original section of the Act as introduced, was added a second section providing as follows:

'And every corporation selling or manufacturing for any corporation mentioned in paragraph (1), any material entering into and used as a component part in the manufacture of any of the articles enumerated in (a), (b), (c), (d), (e), or (f), shall pay for each taxable year an excise tax of five per cent. upon its net profits actually received or accrued for said year, from the sale or disposition of such ma-

terial so entering into or used as a component part in the manufacture in the United States of the articles so enumerated as aforesaid. (p. 13491, Congressional Record for 1916).⁷

This sub-section was stricken from the Bill.

I am therefore of opinion that Congress meant to levy the tax only upon those persons who were manufacturing and selling at a profit the completed things specifically designated in (b), (c), (d) and (e), and on those persons who were manufacturing and selling at a profit any completed part of any of those designated things. That one is not a manufacturer of a part unless the manufacture of that part is carried forward by him to the same point of completion to which it would have been necessary to carry it, if he had been the manufacturer of the completed thing.

And finally, that any doubt as to the true meaning of this taxing Act, should be resolved against the Government and in favor of the citizen. The motion for a new trial is, therefore, refused."

THE CIRCUIT COURT OF APPEALS' CONSTRUCTION OF THE ACT.

We submit that the Circuit Court of Appeals adopted an entirely erroneous standard of construing this statute and that an erroneous construction was necessary in order to sustain the tax collected in this case. In violation of all well known rules the court refused to ascertain the intent of Congress by following

the well established meaning of the language used, but on the contrary based its determination of the intent of Congress upon what it conceived to be the purpose of the statute—a highly artificial process which, as we understand, the authorities, may not be resorted to where the words of the Act, as here, have a well settled and adjudicated meaning.

The court states the congressional intent as follows:

"In ascertaining the true construction of the law and thus carrying out its purpose, this Court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done. When Congress took up this matter the situation was that during the two preceding years of the world war, great quantities of war munitions and war accessories had been manufactured in this country and sold to the Allied Governments at high and abnormal prices, owing to the fact that they were abnormal products and the call for them was imperative and instant. It was therefore felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation."

(Record, p. 161).

And again:

"In addition to the feeling that these war supplies manufactured here and sent abroad were

proper subjects of temporary taxation, there were other motives which led to the passage of this statute, namely, *the pacifist spirit which urged embargo legislation to prevent the exportation of war supplies to belligerents and the pro-German spirit which asserted the furnishing of war munitions to the Allies was an unneutral act.* It will thus be seen that whatever may have been the impelling motive of individual legislators, the fact is that all united in a common purpose to include the whole subject of war munitions and war accessories in a common class. (Italics ours.) And since all that were thus sent abroad were manufactured here, indeed the Act is expressly directed to 'such articles manufactured within the United States,' and the profits made from such manufacture were the gauge to the taxation imposed, it is clear that the means Congress used to bring the whole subject matter of war munitions and war accessories within the sphere of taxation was to take these goods as they were manufactured and to impose an excise tax on the person who manufactured such articles or 'any part of any of the articles mentioned' and to fix such tax by 'the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.' (Record, p. 161.)

And again:

"Turning to the act, we think the broad purpose of Congress is clear to select as the subject of taxation, war munitions and war appliances, for each of the enumerated articles is such as can be

used for war. At the same time it must have been foreseen that many of these articles could also be used for the normal needs of commerce, and those who made them for such normal use were not making abnormal profits. So also the articles that in their completed, unitary form were adapted solely for war purposes might have parts which in and by themselves, could be also used and would naturally be used for the normal purposes of commerce. In view of such recognized facts, was it the purpose of Congress to tax the manufacture of such articles, or parts thereof, which, while susceptible of warlike use, were, in point of fact, not so used, but remained in the channels of normal commerce and use? Clearly not; first, because such articles or parts of articles, when sold in ordinary commerce, did not earn war profits, and second, because the general purpose of the act not to subject the ordinary normal commerce of the country to this abnormal temporary war tax is manifested even in such warlike agencies as gun powder, explosives, caps and the like, by the Act providing that such of said articles as are 'used for industrial purposes' are excepted. It would therefore seem that the broad general purpose was to include in the field of taxation, all such specified articles or parts thereof as were either made for war purposes or as were withdrawn from the general field of commerce and used for the making of war articles." (Record, p. 162.)

(Contrast this with the requirement of Congress in Section 304 [this book, p. 112] that everyone man-

facturing the "*articles specified* in Section 301" must make a return.)

It will thus be seen that the reasons that the court gives for construing the language in the way it does are (a) Congress felt that the large abnormal profits incident to *war contracts* created a remunerative field for temporary taxation; (b) that the *pacifist spirit* abroad in the United States urging embargo legislation to prevent the exportation of *war supplies* made the profits from such business an attractive field for taxation, or, in other words, the popularity of the business with certain people made it an attractive field for taxation; (c) that it is, therefore, clear that Congress intended to bring the *whole subject matter of war munitions and war accessories* within the sphere of taxation; (d) as the court below says finally the broad purpose of Congress thus became clear to tax the manufacturers of *all articles* or parts of articles which were adapted solely for war purposes and as were withdrawn from the general field of commerce and used for the making of war articles, and (e) that it was clear that Congress did not intend to tax any of the articles mentioned unless they were used for war purposes.

Thus it would seem that the conclusion of the court below as to the meaning of the act which enabled it to say that the tax upon the profits of the Steel Company was legitimate was that the Steel Company had manufactured something which was "withdrawn from the general field of commerce and used for the making of war articles."

It will be noted that the Circuit Court of Appeals was led to reach this conclusion for the reason stated above; that is, it is the judge's belief that it was the intent of Congress to tax such things. And it will also be observed that it is nowhere argued in the opinion that the words which Congress used in the statute have ordinarily any such meaning.

Now we think this reasoning really means that the manufacturer of any material used in the manufacture of war supplies is taxable, provided the material has been made in a size, shape or of an integral structure which fits it for use in the manufacture of a cannon for example, and unfits it for sale to the trade generally.

This theory is in direct opposition to the words of the act:

(a) The act mentions *certain specific articles* and over and over again refers to "the articles mentioned"—a clear and specific declaration that no other articles are included.

(b) Congress itself rejected the proposition to tax the manufacture of materials used in the manufacture of any of the articles enumerated.

(c) It renders nugatory what Congress said about "parts."

Manifestly if Congress in taxing the manufacturer of an article meant to tax the manufacturer of the material that went into the article, it did not need to say anything about "the manufacture of a *part*" of the article. Does not the fact that Congress mentioned the manufacture of a part of the article show that it did not intend to tax the material man?

This theory also discloses a mistaken idea as to manufacturing practice. The Court's thought seems to be that steel is steel and that it is ordinarily sold in some sort of shape which fits it for "the general field of commerce." But quite the contrary—Steel is ordinarily *made* for the purchaser and to his specifications, both as to quality and shape. Practically and in reality, projectile steel for example is withdrawn from the general field of commerce, not when it take a shape that unfits it for any other use, but when the projectile manufacturer orders it to be made.

It is confidently submitted that the decisions of the Circuit Court of Appeals violates three fundamental and established rules of law:

- (1) That the intent of Congress is to be derived from the meaning of the words used to express that intent; and that that meaning, when ascertained, not only determines the meaning of the statute but the intent of Congress in enacting it.
- (2) Revenue laws "are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business."
- (3) "In every case of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens."

THE ACT, WHEN ITS ESSENTIAL WORDS ARE GIVEN THE INTERPRETATION FOR WHICH WE ARE CONTENDING, HAS A NATURAL APPLICATION TO A GREAT NUMBER OF COMMODITIES, AND NO NECESSITY EXISTS FOR EXTENDING THE MEANING OF THE WORDS BY ANY DOUBTFUL CONSTRUCTION WITH A VIEW TO FINDING SUBJECTS FOR ITS OPERATION.

The act was considered mainly by the court as if it meant to tax profits derived only from shell or projectiles and their parts; whereas it included also profits from cartridges, torpedoes, small arms, cannon, machine guns, bayonets, motor boats, and submarines, and their parts. It is a matter of common knowledge that all the above articles have definite parts—some of them many parts—which are completed in finished form and supplied in the trade to manufacturers of the composite articles, and are also manufactured by munition makers themselves as independent parts and supplied to dealers and other manufacturers.

The following list is significant:

List of Distinct Parts of Various Kinds of Articles Mentioned in Section 301 of Title III of the Act of September 8th, 1916, Which Are Commonly Recognized as "Parts" for Assembling or Sale Purposes, and Manufactured and Known in the Art and Trade as Such.

The various articles mentioned in the above Section are well known respectively to have the following separately purchasable parts:

CARTRIDGES:

Cartridge case;
Primer;
Powder;
Wad, if any;
Projectile.

TORPEDOES (Automobile variety):

War head;
Practice head;
Explosive charge;
Air flask;
Air flask head;
Alcohol lamp;
Propelling engine;
Obry gyroscopic gear;
Many screws.

SMALL ARM:—

SHOT GUN:

Barrel;
Sight;
Hammer;
Firing pin;
Firing pin spring;
Fore end;
Trigger;
Trigger spring;
Stock;
Heel plate;

Lever;
Lever spring;
Main spring;
Bolts;
Many screws.

RIFLE (Repeating) :
Barrel;
Sight;
Magazine;
Magazine spring;
Main spring;
Trigger;
Trigger spring;
Fore end;
Fore end cap;
Receiver;
Locking bolts;
Locking bolt pin (male);
Locking bolt bushing;
Stock;
Heel plate;
Many screws.

BAYONETS:

Parts probably never sold singly to the consumer, but consisting usually of a blade; two wooden handle parts; burs and rivets.

ELECTRIC MOTOR BOAT:

Hull;
Motor;
Shafting;

Bearings;
Propeller;
Propeller nut;
Rudder;
Storage batteries;
Steering wheel;
Tiller ropes;
Tiller;
Tiller rope pulleys;
Reostat;
Controller;
Electric wiring;
Anchor;
Hawser;
Side lights;
Riding lights;
Water tanks;
Construction and trimming hardware;
Fittings, such as
Cushions;
Lavatory fixtures;
Galley stove;
Refrigerator;
Cooking equipment;
Bunks and their equipment;
Signals;
Compass;
Repair tools.

SUBMARINE BOAT:

All parts listed for electric motor boats, and
in addition
Magazine follower:

Bolt;
Firing pin;
Firing pin spring;

Extractor;
Carrier;
Carrier spring;
Finger lever;
Torpedo tubes;
Racks;
Oil engines;

Ignition system;
Oil tanks;
Camera Lucida;
Gyroscopic compass;
Steering engine;
Air pump;
Water pump;
Compressed air tanks;
Valves and fittings;
Manometers;
Pressure gauges;
Engine room signal system.

REVOLVERS AND PISTOLS:

Many parts, as in the case of rifles and shot guns.

CANNON:

Gun proper;
Breech mechanism, consisting usually of
Breech block;

Mushroom;
Gas check rings;
Gas check pad;
Mushroom nuts, washers and springs;
Carrier;
Rotating gear;
Lever handle;
Hinge bolt;
Frequently many other parts.

MACHINE GUN:

The machine gun contains most of the parts of a rifle, and many others, chiefly connected with the automatic features.

The profits derived from the sale of every one of the above parts were hit by the act. They were what were aimed at by Congress. It was a large target. The lower Court seems utterly to have ignored the existence of the above parts as the natural basis for the application of the act to "parts."

THE INTENT OF CONGRESS IS TO BE DERIVED FROM THE MEANING OF THE WORDS USED TO EXPRESS THAT INTENT, AND THAT MEANING WHEN ASCERTAINED, NOT ONLY DETERMINES THE MEANING OF THE STATUTE, BUT THE CONGRESSIONAL INTENT IN ENACTING IT.

In *United States vs. Goldenberg*, 168 U. S., 95, 102, the Court said:

"The primary and general rule of statutory

construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies * * * justify any judicial addition to the language of the statute."

It is a canon of statutory construction, which accords with the plainest dictates of common sense, that where the meaning of a statute is plain there is nothing to construe.

"* * * the province of construction lies wholly within the domain of ambiguity, * * *."

Hamilton vs. Rathbone, 175 U. S., 414, 421.

But, as this Court said in a very early case, frequently followed since:

"Where the mind labors to discover the design of the legislature it seizes everything from which aid may be derived; * * *."

United States vs. Fisher, 2 Cranch, 358, 386.

This extrinsic aid—in the instant case the supposed policy of Congress—"may be resorted to, to *solve* but not to *create* an ambiguity." (Court's italics.)

Hamilton vs. Rathbone, 175 U. S., 414, 421.

The words of this statute, as we contend, have a perfectly clear meaning, and this meaning, if there be need of strengthening the obvious, has been stamped upon them, as we shall show at length hereafter, by a long course of judicial interpretation, the effect of which is to give them a well understood legislative meaning. Under numerous decisions of this Court it must be presumed, unless the contrary appears, that they were used in this sense in the present statute.

The Abbottsford, 98 U. S., 440.

The Circuit Court of Appeals, instead of following the plain meaning of the words used by Congress, and the well settled legislative meaning thus established by judicial interpretation, has undertaken to alter this meaning to conform to what the Court supposes to be the motives and purposes which led to the passage of the statute. The effect of this appeal to the supposed policy of the law is not to *solve* a doubt, but to *create* one where it would otherwise not exist. The method adopted by the lower Court of bending the meaning of what Congress has plainly said, to conform to some policy which it is surmised Congress entertained, has been several times condemned by this Court.

Hadden vs. The Collector, 5 Wall, 107, 111;
Dewey vs. United States, 178 U. S., 510, 521;
Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1.

In the last named case this Court said (p. 37) :

“As declared in *Hadden vs. Collector*, 5 Wall, 107, 111, ‘what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.’

*Where the language of the act is explicit, this Court has said ‘there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the Court to say, when the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.’ *Scott vs. Reid*, 10 Pet., 524, 527.”*

In *Dewey vs. United States*, 178 U. S., 510, the Court said (p. 521) :

“This Court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. * * * Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of con-

struction as in effect to adjudge that to be law which Congress has not enacted as such."

Judge Phillips, in the case of *McDermon vs. Southern Pacific Co.*, 122 Fed., 669, discusses this question at length. His opinion discusses the question so forcefully that we quote from it at length. He says (p. 675) :

"The tendency on the part of some courts in later times to extend and broaden the plain, simple, apt words of innovating statutes by searching after what is termed the 'legislative policy' of the state, is the worst form of judicial legislation. It has come to pass too frequently that, where kindred legislation to this under consideration happens to be in accord with the inclination of the mind of the particular judge, he begins to search out for what he conceives to be the legislative policy, and, having to his own satisfaction discovered the hidden mind of the Legislature, under the guise of effectuating the legislative intent, he stretches the words of the given statute so as to enlarge its compass far beyond the ordinary meaning of the terms employed by the lawmaker. He thus reads into the statute his own ideas of what the public policy ought to be, rather than what the Legislature has declared. Mr. Justice Peckham, now of the Supreme Court, when on the Court of Appeals of New York, in *Fitzgerald vs. Quann*, 109 N. Y., 441, 17 N. E. 354, said:

"Counsel for the defendant, in his argument before us, concedes the rule to be well established, and almost universally acted on, that statutes

changing the common law must be strictly construed, and that the common law must be held no farther abrogated than the clear import of the language used in the statute absolutely requires. However much modern judges might sometimes be inclined to doubt the beneficial results to be derived from an always strict adherence to the rule, grounded upon some possible doubts of the high order of excellence in all cases of the common law, or of its being without exception the perfection of human reasoning in any other than a very narrow, technical, and one-sided way, yet the rule itself is too securely and firmly established and grounded in our jurisprudence to be altered other than by legislative interference.'

Mr. Justice Harlan, in *Bate Refrigerating Co. vs. Sulzberger*, 157, U. S. 36, 15 Sup. Ct. 516, 39 L. Ed. 601, speaking to this question, said:

'In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden vs. Collector*, 5 Wall, 107, 111 (18 L. Ed. 518): 'What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.'

'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases because no good reason can be assigned why they were excluded from its provisions.' *Scott vs. Reid*, 10 Pet. 524, 527 (9 L. Ed. 519)."

REVENUE LAWS "ARE DESIGNED TO OPERATE UPON THE PUBLIC AT LARGE, AND ARE SUPPOSED TO USE WORDS IN THE SENSES BELONGING TO THE FAMILIAR LANGUAGE OF COMMON LIFE AND COMMERCIAL BUSINESS."

This language is from Justice Story's opinion in *United States vs. Wigglesworth*, 2 Story's C. C. Rep., 369 (1842). He says (p. 373) :

"It would be quite too perilous to found an interpretation of any law upon a verbal distinction so refined and subtle, and *a fortiori*, to found such a distinction in cases of Revenue Laws, which are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business." * * *

This rule is so well established that the citation of any further authorities seems unnecessary.

IN EVERY CASE OF DOUBT, SUCH REVENUE STATUES ARE CONSTRUED MOST STRONGLY AGAINST THE GOVERNMENT AND IN FAVOR OF THE SUBJECTS OR CITIZENS.

In *Gould vs. Gould*, 245 U. S., 151 (1917), Justice McReynolds says, page 153:

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government and in favor of the citizen: *United States vs. Wigglesworth*, 2 Story, 369; *American Net & Twine Co. vs. Worthington*, 141 U. S., 468, 474; *Benzinger vs. United States*, 192 U. S., 38, 55."

One reason for this rule, as stated by Mr. Justice Story, in *United States vs. Wigglesworth*, 2 Story's C. C. Rep., 369, is,

"Revenue statutes are in no just sense either remedial laws or laws founded upon any public policy, and therefore are not to be liberally construed."

In *Rice vs. United States*, 53 Fed., 910 (1893), C. C. A., Judge Caldwell quotes with approval the reason

for the rule given by Lord Cairns, in *Partington vs. Attorney General*, L. R., 4 H. L., 100, 122:

“‘As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed, comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.’”

THE FUNDAMENTAL IDEA OF A MANUFACTURED ARTICLE IS THAT IT MUST BE SO NEARLY COMPLETED AS TO BE SERVICEABLE FOR THE PURPOSE FOR WHICH IT WAS DESIGNED.

In *United States vs. Potts*, 9 U. S., 284 (1809), the question was whether round copper plates, turned up at the edge, and intended to be made into cooking utensils, were manufactured articles or raw copper.

Chief Justice Marshall says (p. 287):

“From the facts stated, the copper in question cannot be deemed manufactured copper, within the intention of the legislature.”

In *Lawrence vs. Allen*, 48 U. S., 785 (1849), the question was whether certain imported rubber was manufactured or unmanufactured India rubber. It appeared that it was customary in the foreign country to dip crude clay models, representing a bottle, or a shoe, or some such thing, in the sap of the tree, and by evaporation to let the sap harden on the models. Then by breaking out the clay they had left crudely shaped shoes or bottles, or something of the kind. It appeared also that it was the habit of importers in the United States to import rubber in this shape, which they used in the subsequent manufacture of articles, including india-rubber shoes made in entirely different ways to suit the American and European markets. This manufacture involved re-melting the rubber shoes which had been imported, and using them simply as raw material. It appeared, however, from the evidence that the India rubber shoes imported were in such a condition that they could be worn without further labor upon them, and were made for the purpose of being so worn and were often actually worn in this form. It was held that they were dutiable as India rubber shoes, because they were a completely manufactured article. And the fact that it might suit some manufacturers' convenience to use them as a raw material was not controlling.

Justice Woodbury says (p. 794), speaking of the more modern idea attached to the word manufacture,

* * * "it is making an article, either by hand or machinery, into a new form capable of being used, and designed to be used, in ordinary life."

He says again (p. 793):

* * * "it is manifest that the India rubber

is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into *a shape which is suitable for use, and adapted with a design to be used* in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful and convenient form for other manufacturers here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is 'unmanufactured,' or, in other words, not made abroad for use in its existing form except as a raw material, like pig iron or pig lead. But in the former case, within that policy or purpose, it is 'manufactured' as it is made in a shape for use as a manufacture *without being afterwards materially changed in form*, and is designed to be so used, and hence comes in as a competitor with our own manufacturers."

Hartranft vs. Wiegmann, 121 U. S., 609 (1886), is considered the leading case upon this subject. The question was whether the sea shells there imported, upon which certain ornamental designs had been etched or carved, were still sea shells and came in free, or whether they were manufactured shells and subject to duty.

Justice Blatchford says (p. 615) :

"They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell."

Dejonge vs. Magone, 159 U. S., 562 (1895), was a case involving the manufacture of paper.

Justice White says (p. 568) :

"There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufactures of paper."

In Anheuser-Busch Brewing Association vs. United States, 207 U. S., 556 (1907), Justice McKenna says (p. 562) :

"There must be transformation a new and different article must emerge, 'having a distinctive name, character and use.' "

In re Blumenthal, 51 Fed. Rep., 76, Circuit Court, S. D. New York (1892) (Affirmed 4 U. S. C. C. A., 680),

The question was whether certain small polished disks of mother of pearl which were completed buttons, except that they were not pierced with holes or shanked through their centers, were dutiable as buttons.

Judge Lacombe says (p. 78) :

"The question to be determined here is whether they are 'buttons' within the language of the tariff act—language which is to be taken in its ordinary meaning unless it appears that trade and commerce have given some specific meaning to the words employed. Now, although they may stop short of be-

ing complete buttons by a very small measure, that circumstance is immaterial. * * *

"According to the usages of common speech, these articles here are not completed buttons, because they lack the essential element of a device whereby they may be affixed to garments."

United States vs. Reisinger, 94 Fed. Rep., 1002, C. C. A., Second Circuit (1899).

It was held that carbon sticks, 36 inches long, intended for ultimate use in electric lighting, but which had to be cut into suitable lengths and had to have the ends pointed or ground before they could be used, were not dutiable as carbons for electric lighting.

The Court said, *Per Curiam* (p. 1003) :

"Accepting these findings as correct, we concur in the conclusion of the board that although ultimately intended for electric lighting, the fact that it is necessary to bestow further labor on them in order to fit them for such use precludes their inclusion in paragraph 98."

Hunter vs. United States, 134 Fed. Rep., 361, C. C. A., Second Circuit (1904).

The articles in question were pieces of paper, cut by machinery into appropriate shapes and sizes so that they could be folded and pasted and would then form an envelope.

Judge Lacombe says (p. 362) :

"In common everyday speech the word 'envelope' is used as implying the actual case or wrapper, of paper or cloth, in which a letter or the like may be inclosed. The 'blanks' here imported have not yet become such case or wrapper, even though they may be of such shape and size as to unfit them for other purposes. It is still necessary to fold over the flaps, and to apply gum to the edges of some of them, and actually to stick together the side and bottom flaps. These are substantial steps in the process of manufacture."

Tide Water Oil Co. vs. United States, 171 U. S., 210 (1897), is a leading case, and is known as the "*Box-Show Case*."

Justice Brown says (p. 217) :

"* * * the finished product of one manufacture thus becoming the material of the next in rank."

Again (pp. 217-218) :

"It is not always easy to determine the difference between a *complete* and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be *partially manufactured* within the meaning of this section."

Again (p. 218) :

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; *while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the difference parts of a watch which need only to be put together to make the finished article.*"

United States vs. Semmer, 41 Fed., 324 (1890), Circuit Court, S. D. New York, was a case which involved the question whether the glass imported was completely manufactured.

Judge Lacombe says (p. 326) :

"* * * the mere fact of the application of labor to an article, either by hand or by mechanism, does not make the articles necessarily a manufactured article, within the meaning of that term as used in the tariff laws, unless the application of such labor is carried to such an extent that the article suffers a species of transformation, and is changed into a new and different article, having a distinctive name, character or use. * * *"

"* * * *The labor bestowed upon the article is to be continued to such an extent as to transform it into a new and different article commer-*

cially, having a distinctive name in commerce, having a distinctive character commercially, or having a distinctive commercial use."

Erhardt vs. Hahn, 55 Fed., 273 (1893), C. C. A., Second Circuit, was a case which involved duties upon agate and other semi-precious stones, cut, ground and polished into shape and for the uses, respectively, as penholder handles, knife handles, button-hook handles, etc. The court held that they were not manufactured articles.

The court says (p. 275) :

"It has been repeatedly decided, under the tariff acts, that where an article has been advanced through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a *completed* shape designed and adapted for a particular use, it is deemed to be a manufacture."

In *Robertson vs. Gerdan*, 132 U. S., 454 (1889), the question involved was whether pieces of ivory for the keys of pianos and organs are musical instruments.

Justice Blatchford says (p. 459) :

"It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments."

In *Worthington vs. Robbins*, 139 U. S., 337 (1890) the question was what duty should be imposed upon white hard enamel imported for the purpose of making watch dials.

Justice Blatchford uses this language (p. 338) :

“* * * in the form or condition as imported, it cannot be used for any of the purposes above described, nor for any purposes whatever of practical use to which it is adapted or ever applied; and that, *before it can be applied to any practical use*, its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied.”

Saltonstall vs. Wiebusch, 156 U. S., 601 (1894), was a case which involved the question whether carpenters' pincers, scythes, and grass-hooks, made of forged steel, were taxable as forgings of iron and steel, or as manufactures composed of iron and steel. The court held that they were not taxable as forgings, although they were made by forging, because there had been two additional processes after the forging, to wit, (1) tempering and (2) grinding.

Justice Brown says (p. 603) :

“But we do not understand the term ‘*forgings*’ to be applicable to articles which receive treatment of a different kind than hammering before they are complete; such, for example, as grinding, tempering, or polishing.”

Allen vs. Smith, 173 U. S., 389 (1898),
and

Burdon Sugar Refining Co. vs. Payne, 167 U. S., 127 (1896), the "Sugar Bounty Cases," are illustrative of the same proposition. Here it was held that the man who completed the manufacture of sugar was the one who was entitled to the bounty.

In *Allen vs. Smith*, Justice Brown says (p. 399) :

"In a number of cases arising in this court under the revenue laws, it is stated that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product*. * * *" (p. 400) :

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (p. 401) :

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty

with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it."

Schooverling vs. United States, 142 Fed., 302 (1906), C. C., Southern District, New York, before Judge Hazel.

It was held that certain India rubber pads for guns were not dutiable as shot guns or *parts of shot guns*.

Norris vs. Pennsylvania, 27 Pa., 494 (1856), involved the question whether iron in form and size fitted and designed for locomotive engine tires, with flanges, so as to require only to be cut the proper length, turned, welded and adjusted to the cast iron wheels, were parts of a locomotive.

Justice Black uses this language (p. 496) :

"To make in the mechanical sense does not signify to create out of nothing; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process."

In re First National Bank of Belle Fourche, 152 Fed., 64 (1907), C. C. A., Eighth Circuit.

Justice Sanborn uses this language (p. 67):

“* * * it (the company) produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.”

In *Central Trust Co. vs. Lueders*, 221 Fed., 829 (1915), which was affirmed by the Circuit Court of Appeals, Sixth Circuit, Justice Knappen says (p. 838), quoting Mr. Justice Brown, that the word “manufacture,”

“is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product.”

And again, quoting Mr. Justice Field:

“Manufacture is transformation, the finishing of raw material into a change of form or use.”

Vandegrift vs. United States, 164 Fed., 65 (1908), Circuit Court, E. D. Pa. Judge McPherson says (p. 69), quoting with approval the General Appraiser in *In re Eckstein*, G. A., 5822:

“These decisions amply support the proposition that, in order to constitute a manufactured article, the processes of manufacture devoted to it must be so far completed as to render the article ready for common use, known and designated by a common name, *without additional processes of manufacture.*”

In *United States vs. Thomas Prosser & Son*, 177 Fed., 569 (1910), Circuit Court, S. D., New York, Judge Martin says (p. 571) :

"As I construe these two paragraphs, it is a question of fact as to whether these articles, after having been forged, were so far developed by a finishing process that they have been advanced from the condition of a forging to that of a manufactured metal."

In *Bromley vs. United States*, 154 Fed., 399 (1907), Circuit Court, E. D. Pa., Judge Holland says (p. 400) :

"* * * the word 'castings' in the trade does not include articles made by the casting process which have been advanced in condition by work bestowed on them after they were cast."

In *Bromley vs. United States*, 156 Fed., 958 (1907), Circuit Court of Appeals, Third Circuit, Judge Buffington says (p. 959) :

"In view of the careful work thus expended on them to fit them as parts of valuable machines, we are clear their character as mere castings had merged into the higher mechanical plane of a manufactured article."

The only case in the books that could be considered at all in conflict with these authorities is the case of

United States vs. Riga, 171 Fed., 783 (1909), Circuit Court, District of Massachusetts, Lowell, Circuit Judge, which involved the question of whether rough

bored rifle barrels were dutiable as rifles or parts thereof.

It was held by the court that although these particular rifle barrels had still to be rifled and colored, they were parts of rifles. The case is an extreme one and seems to run counter to all the other decisions. But Judge Lowell's opinion is based upon the proposition that they were substantially completed. He says (p. 784) :

"In the case at bar the imported article upon mere inspection is found to be nothing other than a rifle barrel, made solely for use as a part of a rifle and absolutely suitable for no other purpose. The fact that the barrels are not wholly finished we do not consider important, for otherwise an importer could change classification by merely omitting to put the *final touch* upon an article, thus rendering it impossible to assemble the parts in their imported state."

Again (p. 784) :

"A rough-bored barrel, *when approaching nearly the finished condition*, affords sufficient evidence as to its special adaptation for use as a rifle barrel, and would appear to us to be entitled to be so considered."

IT IS EVIDENT that when we speak of a MANUFACTURED article or of a MANUFACTURER of an article, we mean A THING, or a MANUFACTURER of a thing, that has been carried to a state of substantial completion, so that it is capable of use by the purchaser or user

as the thing which was designed, or which the manufacturer and the consumer were contracting about.

UNDER THE AUTHORITIES A PART OF A
THING MEANS A SUBSTANTIALLY
FINISHED PART.

The following cases are directly in point:

United States vs. Thirty-one Boxes, 28 Fed. Cases, 56, District Court, S. D. New York (1833).

The question was whether pieces of round iron cut into suitable lengths, some being straight and others curved or bent to a U shape, and which were adapted to be formed into the links of cables, were dutiable under the description of "cables and parts thereof," as used in the Act of 1824.

The court held that they were not.

Judge Bets says (p. 61):

"A link considered as a substantive article of manufacture, must unquestionably be *finished*, have every operation performed upon it required to fit it for the use it is destined for; whether round or oval, open or closed, it becomes the link only when the artisan has completed his labor upon it. The link which forms part of a chain cable must necessarily be closed, neither a straight piece of rod, nor bent at one end, nor turned so as

to bring the two ends nearly into union, ~~can~~ in accuracy be said to compose that description of link."

And again (p. 61) :

"But whether this be so or not, it is very clear to my mind, that in the sense of the Act of 1824, nothing can be deemed part of the chain that is not as to itself, as finished and complete as the entire chain."

And again (p. 62) :

"In this view of the subject, the part may consist of several fathoms, or any less extent beyond individual detached links. It denotes a portion taken from the whole, and still retaining the properties of the whole, less only the extent."

In *Vanacker vs. Spalding*, 24 Fed. Rep., 88, Circuit Court, N. D. Illinois (1885), it was held that small India rubber bags, which were intended for the purpose of being inflated with gas, thereby making a small balloon to be used as a child's plaything, were not dutiable as toys.

Judge Blodgett says (p. 88) :

"The only question is whether such an article is a 'toy' or 'a manufacture of India rubber, not otherwise provided for.' I am of opinion that these goods are not 'toys' in the form in which they are imported. In order to make them saleable as toys, they must be inflated and closed so as to retain

the gas, and although this is but a slight addition to them, still they cannot be called playthings or toys until this process is completed."

United States vs. Simon, 84 Fed. Rep., 154, Circuit Court, S. D. New York (1897).

It was held that India rubber tubing, in meter lengths, colored, chiefly used in making stems of artificial flowers, were not dutiable as parts of artificial flowers.

Judge Wheeler says (p. 154) :

"The paragraph under which this manufacture was assessed does not provide a duty on materials for artificial flowers, but for *parts of artificial flowers*, which distinguishes this importation from that in the former case; and this tubing is not any finished part of an artificial flower, but is merely a material from which the stems, as such a part of an artificial flower, can be made."

In *Grempler vs. United States*, 107 Fed., 687 (1901), C. C. A., Second Circuit, Judge Townsend uses this language, which is very pertinent to our case (p. 688) :

"It is contended that this merchandise is *partly manufactured*, because it has been thus made into sheets. This contention is met by proof that these sheets are not available for any purpose until after they have been beaten to one-sixth their present thickness, and then cut into pieces and put into books to be sold, apparently for use in gilding."

Boker vs. United States, 97 Fed., 205 (1899), C. C. A., Second Circuit, was on appeal from the Circuit Court, affirmed *per curiam* on the opinion of Judge Townsend in the Court below. The question was whether nickel alloy, in the form of rods, sheets, and wire, should be assessed as manufactured articles and wares, composed wholly or in part of any metal, and whether *partly* or *wholly* manufactured, or, under another section, as nickel or alloy of any kind in which nickel was the component material of chief value.

It was held that the wire was properly taxable as a manufactured article, but that the rods and sheets could not be so regarded and were taxable under the raw-material section.

Judge Townsend gives (p. 205) as his reason for not taxing the rods and sheets that—

"They are incapable of practical use without being subjected to further manipulation and manufacture."

and, conversely, as the reason for saying that the wire was taxable—

"The wire is a manufacture of metal, a complete merchantable article, imported in spools, and sold by the spool, to be used in the construction of rheostats, and dealt in commercially in various sizes, adapted to the purposes for which it is wanted."

There are also many decisions of the Board of General Appraisers to the same effect. For example—

In re Protest of Reiss Brothers & Co., T. D., 16977, G. A., 3405; Synopsis of Treasury Decisions, 1896, p. 273.

It was held that blocks of meerschaum that were shaped like pipe bowls and which were so far advanced in manufacture as to be unfit for any other purpose than pipe bowls, but which were incomplete in not being bored out so as to have an orifice to hold the tobacco and which had no orifice for the insertion of the pipe stem, were dutiable as pipe bowls, because they had "not been sufficiently advanced in manufacture to answer the purpose of pipe bowls or smokers' articles, and that they are not such in fact."

In *T. D. 21719, G. A. 4590, Treas. Dec., Vol. 2, p. 615*, it was held that pieces of polished hard rubber, intended for mouth pieces for pipes, but which had to be bored and have screws put in in order to render them suitable for smokers' use, were not dutiable as smokers' articles.

The same decision was made in

T. D. 32396, which was another India rubber pipe mouth-piece case.

In re Protest of United States Express Co., T. D. 35697, Treas. Dec., Vol. 29, p. 203,

it was held that pieces of wood, which had been roughly

carved into the shape and form of a pipe bowl, but which had to have a number of additional steps taken before they would be a finished product, were not dutiable as pipe bowls.

Protest of Benedict Weiss, Treas. Dec., Vol. 29, p. 796, was another pipe bowl case, and reads the same way.

Parts of Musical Instruments, T. D. 27207.

The question there before the Board of General Appraisers was about blocks of granadilla wood, rough turned and bored, and intended for use in the manufacture of clarinets. The Board of General Appraisers says (p. 397) :

"Paragraph 453 provides for musical instruments and parts thereof. The disputed articles are in the nature of materials intended to be made into musical instruments, *but in their rough condition as imported they certainly are not parts of such instruments*. It is doubtful if any but completed parts which require only assembling to make them musical instruments, or are intended to supply a missing part thereof, would be included in this paragraph. A reference to paragraph 434, which provides for parts of jewelry, finished or unfinished, by inference would seem to exclude unfinished parts of musical instruments from classification under paragraph 453, just as rubber tubing in meter lengths, colored, and adapted especially for use in the manufacture of artificial flowers, was held not to be parts of artificial flowers. *United States vs. Simon*, 84 Fed., 154.

The goods under consideration although unquestionably manufactures of wood, are in a crude condition and have to undergo a still further process of manufacture before they become parts of musical instruments. We make a corresponding finding of facts and sustain the claim that the merchandise is dutiable at 35 per cent. ad valorem under paragraph 208 of the present tariff act, the collector's decision being reversed."

In *T. D.* 2547, printed in Corporation Trust Company's War Tax Service, 1917, p. 1208, Section 6526, a decision of the present Commissioner of Internal Revenue is quoted on the taxing of the heads of golf clubs, which the Commissioner of Internal Revenue held not to be *parts of games*.

He says, among other things:

"The one who produces the finished product is the manufacturer and is charged with the tax."

Again, in *T. D.* 2570, printed in Corporation Trust Company's War Tax Service, 1917, p. 1215, the Deputy Commissioner of Internal Revenue, G. E. Fletcher, says:

"When goods manufactured by a person require further manufacture before being used by the consumer, the one completing the manufacture is liable for the tax."

The United States Court of Customs Appeals has reached the same conclusion.

Thus in the case of *Fenton vs. United States*, 1 U. S. Ct. Cust. App., 529, the court said (p. 532) :

"A part of a fishing tackle may well mean a rod or a reel, a hook or a line, and these articles are also in themselves fishing tackle and collectively so designated. But we do not think, in its common, ordinary meaning, the term 'fishing tackle' includes a rod, reel, hook, or float that is not in *finished condition*, ready for the angler's use, and the term 'parts thereof' must refer to the *completed article*, whatever it may be, that is also ready for use either alone or in connection with other articles of the angler's outfit. *When ready for use it is a part of the fisherman's tackle, his outfit, one of his implements; and if not in a condition to be used, of course he cannot use it, and it is not fishing tackle or a part thereof.*"

THE GOVERNMENT'S CONTENTION.

A. That the Cases Cited by Us Are Not Controlling Because they Are Import Duty Cases While this Tax Is Not on the Article But on the Business.

There is no such distinction in the cases.

Thus, the question in *Allen vs. Smith*, 173 U. S., 389, and

Burdon Sugar Refining Co. vs. Payne, 167 U. S., 127, was not a question of levying a tax upon sugar or upon the manufacture of sugar, but was a case of pay-

ment of bounty to the *producer* of sugar, which we take it means the same thing as the *manufacturer* of sugar. If anything the word "producer" is a little broader than the word "manufacturer."

The Supreme Court held that it was the *man* who *produced* (manufactured) the *finished* sugar, who was entitled to the bounty. And it was upon the authority of the tax cases that the Supreme Court ruled the case.

In *Allen vs. Smith*, Justice Brown says (p. 399) :

"In a number of cases arising in this court under the revenue laws, it is said that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product*. * * *"

(p. 400) :

"So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. *That appellation is reserved for him who turns out the finished product.*"

Again (p. 401) :

"To return to the illustration of manufacture. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufac-

turer of watches be compelled to share the bounty with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it."

The *Box-Shook Case*—*Tide Water Oil Co. vs. United States*, 171 U. S., 210,—involved the question whether the Tide Water Oil Company was entitled to a drawback under the provisions of R. S., 3019 (Compiled Statutes, p. 6829).

The question arose whether the articles exported had been manufactured in the United States by the use of imported merchandise or materials upon which customs duties had been paid. It was in determining the question whether the articles had been wholly manufactured within the United States that the Supreme Court turned again to the tariff cases to determine what was a manufacture. And in that case they used this language:

Justice Brown says (p. 217):

"* * * the finished product of one manufacture thus becoming the material of the next in rank."

Again (same page):

"It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article

which can only be used for a particular purpose, *in which the process of manufacture stops short of the completed article*, can only be said to be *partially manufactured* within the meaning of this section."

Again (pp. 217-18) :

"It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior successive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber or cloth; *while a partial manufacture is a mere stage* in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only to be put together to make the finished article."

So it was in the case of *Norris vs. Pennsylvania*, 27 Pa., 494, where the question was whether the plaintiff was liable to a tax which was imposed by the terms of the act upon all dealers who kept a store for the sale of goods, except "mechanics who kept a store for the purpose of vending their own manufactures exclusively."

It was held in this case that the fact that the locomotive manufacturer bought tires for the wheels did not prevent the locomotives from being his exclusive manufacture. And it was in this connection that Justice Black used the language, quoted so frequently in the

tax cases that involve the question what a manufacture is, in which he said (p. 496) :

"But what is manufacturing? It is making. To *make* in the mechanical sense does not signify to *create out of nothing*; for that surpasses all human power. It does not often mean the production of a new article out of materials entirely raw. It generally consists in giving new shapes, new qualities, or new combinations to matter which has already gone through some other artificial process. A cunning worker in metals is the maker of the wares he fashions, though he did not dig the ore from the earth, or carry it through every subsequent stage of refinement. A shoemaker is none the less a manufacturer of shoes because he does not also tan the leather. A bureau is made by the cabinet-maker, though it consists in part of locks, knobs, and screws, bought ready made from a dealer in hardware."

So when the question has arisen under the bankruptcy or insolvency acts, whether the bankrupt was a manufacturer, identically the same test has been applied, and the same cases appealed to as authority.

First National Bank of Belle Fourche, 152 Fed., 64 (1907), C. C. A., 8th Circuit.

In re Rheimstrom & Sons Co., 207 Fed., 119 (1913).

In the case of *Central Trust Co. vs. Lueders*, 221 Fed., 829, C. C. A., 6th Circuit, which involved the question whether or not the bankrupt had been a man-

ufacturer within the meaning of the Kentucky statute, Justice Knappen quoted with approval (p. 838) Mr. Justice Brown's language in the *box shook case*, that the term "manufacture" is "ordinarily used to denote an article upon the material of which labor has been expended to make the *finished product*," and further in his opinion, quoted Mr. Justice Field's language, in *Kidd vs. Pearson*, 128 U. S., 1, that "manufacture is transformation, the finishing of raw material into a change of form or use."

In *Smith vs. Rheinstrom*, 65 Fed., 984, a case in the Circuit Court of Appeals for the Sixth Circuit, the question was whether a certain preparation of cherry juice was dutiable as an alcoholic compound. The question was raised before Judge Taft, What is a manufacture? and he said that whether the article was cherry juice or a manufacture of cherry juice "must depend, of course, upon the amount of change to which the original article has been subjected to make the new article."

So in the Circuit Court of Appeals for the Second Circuit in the case of *Erhardt vs. Hahn*, 55 Fed., 273, it was said *Per Curiam* (p. 275) :

"* * * where an article has been advanced through one or more processes into a *completed* commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material, and is put into a *completed* shape design and adapted for a particular use, it is deemed to be a manufacture."

So we see that the distinction sought to be made by the Government between import-duty cases and other cases is unsound, and that the same test of whether the article has been finished or not has been applied to all kinds of cases, including the cases where it is the person who is carrying on the manufacture, who is entitled to some benefit or exemption.

B. The Contention That the Act was Intended to Cover Profits Made in the Manufacture of All Munitions is Unfounded.

This has been already discussed and, in fact, disposed of as we think by inference in the argument which we have made upon the principal question (p. 32 ff.)

As this suggestion seemed to meet with some favor in the opinion of the Circuit Court of Appeals, it is well to look at it briefly as an independent ground of liability.

It is perfectly clear that there is nothing in the law to sustain this.

One gains nothing by calling this "The Munitions Manufacturer's Tax Act." The word "munitions" occurs only in the title.

Munition was originally a wall; that is, a place of defense,—hence a fortification. This use of the word is

nearly obsolete. Its modern meaning is any equipment or provision for war. Webster says:

"Fortification; stronghold.

Whatever materials are used in war for defense or for annoying an enemy; ammunition; also, stores and provisions; military stores of all kinds; hence, necessary equipment or provision in general; as, the *munitions* for a political campaign."

There are multitudes of different kinds of munitions which are not covered by section 301, such as aeroplanes, canteens, uniforms, motor trucks, ammunition wagons, and, in fact, innumerable war supplies; just as there are things covered by it which are not munitions, such as electric motor boats, also powder, shot guns, etc, when used for sporting purposes. The designation of the profits which are to be taxed is entirely arbitrary, a specific designation of profits from the manufacture of a particular article, regardless of its use (except in the one specific instance of explosives, etc., used in industrial operations).

C. The Attempted Distinction Between the Tax as a Duty Upon Articles or Parts and the Tax as an Excise Tax Upon the Business of Manufacturing Articles or Parts.

This distinction seems to us to be one without a difference, and to have no bearing on the present discussion. There is no difference in kind between customs duties and excise duties such as would, even *a priori*,

require any different rule of interpretation to be applied in respect to the meaning of "parts" of projectiles.

"Duties, Imposts, and Excises" are *ejusdem generis*.

In *Pacific Insurance Co. vs. Soule*, 7 Wall. 433, we find, at page 445, the following:

"Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied in its most restricted meaning to customs; and in that sense is merely the synonym of 'imposts.'

Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from customs, 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excise.'

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor."

In *Nicol vs. Ames*, 173 U. S., 509, involving the Stamp Tax Act of 1898, the Court said at page 519 (italics ours) :

"We think the tax is in effect a *duty or excise* laid upon the privilege, opportunity or facility

offered at boards of trade or exchanges for the transaction of the business mentioned in the act."

In *Patton vs. Brady*, 184 U. S., 608, involving a tax on manufactured tobacco, the Court approves definitions of an excise tax as an "inland imposition" or "inland impost" or "inland duty or impost" (pages 617, 618).

In *Flint vs. Stone Tracy Co.*, 220 U. S., 107, the case upholding the constitutionality of the Corporation Excise Tax of 1909, the Court said, at pages 150 and 151:

"It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise.' It has been the subject-matter of considerable discussion—the terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. As Mr. Chief Justice Fuller said in the *Pollock Case*, 157 U. S., 557:

'Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words, "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.'

And in the same connection the late Chief Justice, delivering the opinion of the Court in *Thomas vs. United States*, 192 U. S., 363, in speaking of the words duties, imposts and excises, said:

'We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.'

Duties and imposts are terms commonly applied to levies made by governments, on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, *Const. Lim.* (7th Ed.) 680."

The word "duty" in its broader sense of including inland indirect taxes, might just as well have been used as the word "excise" to designate the character of the present tax. If levied at the seaboard upon importations it would have been properly described as a custom duty. If, therefore, we read the act as if it imposed a duty, and not an excise tax, upon persons manufacturing shells or parts of shells, the question would still remain for answer, just as it remains for answer with the tax thought of as an excise tax, *what are parts of projectiles?* For it is only persons manufacturing the articles or parts of the articles named in the statute who are required to pay taxes on the net profits derived from their sale.

Judge J. W. Thompson in his opinion in the Worth Case (Record in No. 525 p. 97 at the bottom) in addition to conceding that if this were a tax levied as a customs duty upon commodities it could not be sus-

tained, also concedes that if laid upon the article itself, as it is under Title IV Chapter F, Section 6309½ et seq., Compiled Statutes 1918, it would be equally inadmissible.

In his refusal to give controlling, or indeed any, effect to the decisions establishing that a tax on an article or a part means a tax on the finished article or part, on the ground that this tax, as he claims, is on the business of manufacturing munitions or parts—which does not, according to his contention, require the manufacturing processes to be carried to completion in order to expose the manufacture to the tax—he utterly overlooks the essential fact that it is *only persons who manufacture the various classes of articles scheduled, or the parts thereof, who are taxed*, and that they are then not taxed on their manufacturing operations or products generally, but only on the profits derived from the sale of the articles or “parts.” That, of course, means that, even if the tax is to be treated as a tax on the business of manufacturing, it reaches nothing to levy upon until it appears that the manufacturer has made finished articles or made finished “parts,” and has derived profits from their sale.

D. There was No Partnership Nor Joint Relationship in this Case Between the Steel Company and the Projectile Manufacturer, Nor any Subletting of a Contract.

The Circuit Court of Appeals in its decision says (Record, p. 167) :

"To fulfill such shell contract the contractor made sub-contracts with the Forged Steel Wheel Company * * *"

There was no such thing in this case.

The British Government was going to manufacture projectiles in England. It simply contracted with the Steel Company to furnish it forgings *f. a. s. ship*, New York Harbor. The Steel Company had no interest in what became of the forgings. It made no difference to it whether the ship that carried them across the Atlantic was sunk by a German submarine; whether the British Government spoiled some or all of them in making projectiles; whether they ever were made into projectiles; or whether they are still lying in the shape of forgings in the yards of some British projectile manufacturer—these were immaterial questions, as to which there was no evidence in this case.

In the same way, the forgings which were sold in the United States, for example, to the Baldwin Locomotive Works, were so far as the Steel Company was concerned, completely manufactured things. When it furnished steel of the character and shape which it con-

tracted to furnish, it was done. It had no interest in what the Baldwin Locomotive Works did with it, and there is no evidence in the case as to whether any of the forgings were ever made into projectiles or how many of them were made into projectiles or what was done with them, other than the general testimony that from 10 to 18% of forgings are ordinarily spoiled by projectile manufacturers.

The Steel Company simply did in this case what it was always in the habit of doing for every customer; that was, it furnished the steel in the particular shape desired.

The Government takes the stand that the case of the Steel Company is analogous to one where a company takes the contract for completed shells or shell bodies and then contracts with another company to conduct certain of the manufacturing processes, itself doing such parts of the work as it conveniently can do. In other words, the Government's contention is that this case is analogous to one where a portion of the work is sublet. However, such analogy might be seen in some cases, it is not so with the Steel Company. Here certain persons, some of whom were located in the United States, and some in England, undertook to manufacture and sell certain projectiles or parts of projectiles. In the course of this work they found it necessary to purchase for their use certain material. With this aim in view, they purchased from the Steel Company steel in the shape of rough forgings, this steel to have a certain chemical content and to be in a certain shape. No part of the work was sublet.

The forgings were bought as a manufactured whole. They were not bought as parts of projectiles, but were bought as manufactured raw material. Thus it is seen that the process of manufacturing these projectiles or parts of projectiles was not a continuous process in any sense of the word. The Steel Company was not a subcontractor. There was no attempt by subletting of the contract to evade the operation of the Tax Act. The manufacturer of these projectiles or parts of projectiles went into the open market and bought certain material in the shape of rough steel forgings. The Steel Company is not, and never has been a manufacturer of munitions. It is primarily the manufacturer of steel, and sells its steel in the forged state and in many different shapes and of course with varying chemical content. The Forged Steel Wheel Company was not then engaged with any other concern in the manufacture of projectiles or parts of projectiles.

Congress in passing this act evidently resolved to tax the manufacturers' profit in the manufacture and sale of projectiles. Congress realized, however, that many of these munitions, ranging from cartridges to submarines, were usually and technically divided into parts. Recognizing this division, Congress then passed a tax on the profits derived from the manufacture of a part. But this is as far as Congress went or intended to go. It is clear that it did not intend to tax the manufacture of raw material entering into a part or to tax the profit on the manufacture of a part of a part. Manufacturing consists in making a specific article. The Steel Company manufactured forgings and nothing else, and there its work stopped. These

forgings were bought by the companies to whom they were sold by the Steel Company, as other forgings were bought and sold in large quantities throughout the country during the war. It is stretching logic then to assume that this was a subletting of part of the work of the manufacturer of munitions or parts of munitions.

THE THREE SUBSIDIARY QUESTIONS.

- (i) The tax on forgings not manufactured by the Steel Company.
- (ii) The tax on the manufacture of raw steel.
- (iii) Failure to grant a new trial.

(i) *The tax on the profit made on the sale of forgings which were not manufactured by the Steel Company.*

The Steel Company was over sold at that time, as most companies were. It had to go out in the market and buy steel and get somebody to do the forging. What happened was that the Steel Company had contracts to sell forgings, and as to the part of the forgings which it did not make in its own shop, it bought steel from the Illinois Steel Company in Chicago, had that steel sent to the Standard Steel Car Company in Chicago and forged, and had the forgings then sent to the Steel Company's customers. Neither these forgings nor the steel from which they were made was manufactured by the Steel Company. Not a pound of it was ever in its mill yard. It made a purely dealer's profit

of \$1,220,740.59 on this transaction and it has been taxed 12½% on that dealer's profit. We contend that it is plain under the wording of Section 301 that a dealer is not taxable; that a person to be taxable must both manufacture and sell the article. As to these forgings, the Illinois Steel Company escaped any tax because it only made steel in the ordinary market shapes, but we understand that the Standard Steel Car Company did pay the tax on the profit that it made in the forging.

These two situations, when placed in contrast, show the impossibility of working out any uniform rule which puts the burden upon all alike under the construction that was placed on this statute by the Circuit Court of Appeals.

(ii) *The tax on the manufacture of raw steel.*

It must be borne in mind that the instant case differs from any other case before the courts. In this case the Steel Company, without taking the advice of counsel as to its liability, made a return of the profit which it made in its manufacturing plant in converting the steel rounds or billets into forgings and paid, without any protest, the 12½% government tax thereon; and the amount of tax so paid is not involved in this suit. The amount involved in this suit consists of a tax, subsequently assessed and paid, upon other profits.

The Steel Company made a profit of \$754,620.88 in manufacturing steel, before the forging process began. That is, this was steel which was made in the

ordinary way and could have been used for any purpose. When the Steel Company sold the forgings it charged the steel at its market value, but in this case it has been deprived of doing this and has been compelled to pay a tax on its profit clear back through the open hearth furnaces, whereas, in the exactly similar case, above mentioned, the Illinois Steel Company was not required to pay the tax.

(iii) *Failure to grant a new trial.*

In this case the Steel Company had a judgment based upon a verdict rendered by a jury in the District Court. The Circuit Court of Appeals set aside that judgment without sending the case back for a new trial. We submit that this is an infraction of the Seventh Amendment to the Constitution of the United States, which provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

This precise point was ruled in *Myers vs. Pittsburgh Coal Co.*, 233 U. S., 184.

See also:

Pedersen vs. Delaware, Lackawanna & Western R. R. Co., 229 U. S., 146.

Slocum vs. New York Life Insurance Co., 228 U. S., 364.

CONCLUSION.

The argument for the Government in this case has passed through many stages.

The first suggestion was that these rough steel forgings were parts of projectiles, and at the trial of the case in the Court below, that was the Government's contention. The weight of the cases cited by petitioner and the rulings of the Department made it impossible for the Government to insist further upon that contention.

On motion for a new trial in the District Court, the Government fell back upon an unnatural construction of what was meant by the words "every person manufacturing," and said that those words mean "every person who engages in the business of manufacturing;" and that as the Steel Company manufactured something which was known by it to be intended for future fabrication into an integral part of a projectile, it was engaged in the business of manufacturing projectiles. This theory was also shown to be fallacious, and never received any substantial support from any of the Judges who heard this case.

The suggestion was then made by counsel for the Government in the Circuit Court of Appeals that there was what might be called a joint action or collaboration of different people in the manufacture of projectiles; that every person who took any part in the work at any stage was engaged jointly with the other people in

carrying forward a common enterprise, and that each party was responsible for the profits it made in what it did. The Circuit Court of Appeals had some difficulty even with this proposition for the reason that it was manifest that Congress had not imposed any tax on materials, because it said so, and since when a projectile or rifle or cannon manufacturer ordered steel, he ordered steel to be made specially for him, the man who made the steel would necessarily within the broad reasoning of the Court below, have been engaged in the common enterprise. In order to avoid the difficulty, the Court said that the liability depended upon whether or not the manufacture of the material had been carried forward to the point where, by reason of its physical shape, it became useless for any other purpose than the manufacture of a munition.

Therefore, because this particular steel had been sold in a shape that made it convenient for the projectile manufacturer's use, and suitable for his purpose, and was not of value for making automobiles or something else, it had, as the Court said, been withdrawn from the general field of commerce (whatever it meant by that), and the Steel Company had become engaged in the joint enterprise and was taxable.

This obviously was not so.

Here again it seems clear to us that the Judge failed to differentiate this case from the first case discussed in his opinion. In that case—*The Carbon Steel Company vs. Lewellyn*—there was perhaps a basis for

the joint production theory. The Carbon Steel Company had taken the contract to manufacture and sell to the British government complete projectiles. It made the steel, rolled the rounds, and then, through various other persons who had machine shops, machined the steel, made the copper driving bands, the base plates, the nose bushings, etc., put them together and assembled them; the title to all the materials at all times belonging to the Carbon Steel Company, and the work that was done in the various machine works being done at the direction of the Carbon Steel Company upon its materials and in order to enable it to carry out its contract to furnish a complete projectile.

The Circuit Court of Appeals proceeded then to take up the Worth Brothers case, which was a case where the Midvale Steel Company had had the contract to furnish complete projectiles and had purchased the forgings from Worth Brothers. Both corporations were subsidiary to the Midvale Steel and Ordnance Company, and the Circuit Court of Appeals applied the theory of joint intent and common responsibility to both corporations, which perhaps on some theory of disregard of corporate entity might have some foundation.

The Court then came to the latter part of its opinion to dispose of the case of the Steel Company without differentiating that Company's case at all. That Company, as shown by the evidence, had no connection whatever with any of the people who were making munitions. It was simply a steel manufacturer. What it manufactured was steel, and what it sold to the munition manufacturers was steel in the shape of rough

forgings. There its process of manufacture ended. It had nothing whatever to do with the success or failure of subsequent operations, was entirely without interest or concern in what the purchaser did with the forgings, whether he made projectiles out of them or threw them into the river. In fact, as appeared from the uncontradicted evidence, a large percentage of these forgings were spoiled in the subsequent manufacturing process, say from 10 to 18 per cent., which is illustrative of the Steel Company's position in the case, because it made no difference to it whether they were spoiled or not; it was paid for the forgings as sold, regardless of their use, and one of the curiosities of this case is that we are made to pay a tax on the manufacture of forgings which never did become projectiles or parts of projectiles because they were spoiled in the manufacturing process, just as any material may be spoiled.

Furthermore, with the utmost desire to be fair to the Government, and stretching every point against itself, this petitioner, without at the time taking the advice of counsel as to the meaning of the statute, made a return and paid the United States over \$100,000 which was the total profit made in the forging process. The tax which petitioner now seeks to recover is a tax to the amount of over \$100,000 subsequently levied and assessed purely upon its profit as a manufacturer of steel by the open hearth process; and in addition to that, a tax upon the profit that it made upon the purchase of steel from the Illinois Steel Company, and which was forged by another concern, the Standard Steel Car Company (which by the way paid a munition tax on the forging), so that petitioner has been com-

elled here to pay considerably over \$100,000 more out of profits on steel forgings which were never in its shop at all—purely a dealer's profit on steel that was purchased from the Illinois Steel Company and forged by the Standard Steel Car Company.

All this shows the unfairness of attempting to make the liability for tax depend upon some vague idea of Congressional intent, instead of on the words of the statute, and in effect to rule that a man who fails to make a return because he did not manufacture one of the articles specified in the Act, is nevertheless liable to the pains and penalties of this statute because the Commissioner of Internal Revenue or the Courts think that Congress intended that something should be taxed which is not specified in the statute.

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APPENDIX.

Part of the Act of September 8, 1916 (39 Stat. 756 at p. 780) :

Title III. Munition Manufacturer's Tax.

Sec. 300. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "taxable year" means the twelve months ending December thirty-first. The first taxable year shall be the twelve months ending December thirty-first, nineteen hundred and sixteen; and

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Sec. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any

part of any of the articles mentioned in (b), (c), (d), or (e); shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: *Provided, however,* That no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen.

(2) This section shall cease to be of effect at the end of one year after the termination of the present European war, which shall be evidenced by the proclamation of the President of the United States declaring such war to have ended.

Sec. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States, the following items:

- (a) The cost of raw materials entering into the manufacture;
- (b) Running expenses, including rentals, cost of repairs and maintenance, heat, power, insurance, management, salaries and wages;
- (c) Interest paid within the taxable year on debts or loans contracted to meet the needs of the busi-

ness, and the proceeds of which have been actually used to meet such needs;

(d) Taxes of all kinds paid during the taxable year with respect to the business or property relating to the manufacture;

(e) Losses actually sustained within the taxable year in connection with the business of manufacturing such articles, including losses from fire, flood, storm, or other casualty, and not compensated for by insurance or otherwise; and

(f) A reasonable allowance according to the conditions peculiar to each concern, for amortization of the values of buildings and machinery, account being taken of the exceptional depreciation of special plants.

Sec. 303. If any person manufactures any article specified in section three hundred and one and, during any taxable year or part thereof, whether under any agreement, arrangement, or understanding, or otherwise, sells or disposes of any such articles at less than the fair market price obtainable therefor, either (a) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person, or (b) with intent to cause such benefit, the gross amount received or accrued for such year or part thereof from the sale or disposition of such article shall be taken to be the amount which would have been received or accrued from the sale or disposition of such article if sold at the fair market price.

Sec. 304. On or before the first day of March, nineteen hundred and seventeen, and the first day of

March in each year thereafter, a true and accurate return under oath shall be made by each person manufacturing articles specified in section three hundred and one to the collector of internal revenue for the district in which such person has his principal office or place of business, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, setting forth specifically the gross amount of income received or accrued from the sale or disposition of the articles specified in section three hundred and one, and from the total thereof deducting the aggregate items of allowance authorized in section three hundred and two, and such other particulars as to the gross receipts and items of allowance as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may require.

Sec. 305. All such returns shall be transmitted forthwith by the collector to the Commissioner of Internal Revenue, who shall, as soon as practicable, assess the tax found due and notify the person making such return of the amount of tax for which such person is liable, and such person shall pay the tax to the collector on or before thirty days from the date of such notice.

Sec. 306. If the Secretary of the Treasury or the Commissioner of Internal Revenue shall have reason to be dissatisfied with the return as made, or if no return is made, the commissioner is authorized to make an investigation and to determine the amount of net profits and may assess the proper tax accordingly. He shall notify the person making, or who should have

made, such return and shall proceed to collect the tax in the same manner as provided in this title, unless the person so notified shall file a written request for a hearing with the commissioner within thirty days after the date of such notice; and on such hearing the burden of establishing to the satisfaction of the commissioner that the gross amount received or accrued or the amount of net profits, as determined by the commissioner, is incorrect, shall devolve upon such person.

Sec. 307. The tax may be assessed on any person for the time being owning or carrying on the business, or on any person acting as agent for that person in carrying on the business, or where a business has ceased, on the person who owned or carried on the business, or acted as agent in carrying on the business immediately before the time at which the business ceased.

Sec. 308. For the purpose of carrying out the provisions of this title the Commissioner of Internal Revenue is authorized, personally or by his agent, to examine the books, accounts, and records of any person subject to this tax.

Sec. 309. No person employed by the United States shall communicate, or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this title, or allow any such person to inspect or have access to any return furnished under the provisions of this title.

Sec. 310. Whoever violates any of the provisions of this title or the regulations made thereunder, or who

knowingly makes false statements in any return, or refuses to give such information as may be called for, is guilty of a misdemeanor, and upon conviction shall in addition to paying any tax to which he is liable, be fined not more than \$10,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 311. All administrative, special, and general provisions of law, relating to the assessment and collection of taxes not specifically repealed, are hereby made to apply to this title so far as applicable, and not inconsistent with its provisions.

Sec. 312. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all necessary regulations for carrying out the provisions of this title, and may require any person subject to such provisions to furnish him with further information whenever in his judgment the same is necessary to collect the tax provided for herein.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY, PETI-
tioner,
v.
C. G. LEWELLYN, COLLECTOR OF INTERNAL
Revenue for the Twenty-third District
of Pennsylvania, Respondent. } No. 526.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT.*

BRIEF FOR THE RESPONDENT.

This case is here on writ of certiorari to review a judgment of the Circuit Court of Appeals reversing one of the District Court upon a directed verdict allowing a recovery for \$246,920.18, the amount of certain taxes, paid under protest, with interest.

STATUTE INVOLVED.

The taxes in question were collected under the provisions of section 301 of the act of Congress approved September 8, 1916 (39 Stat., c. 463, p. 781), the pertinent parts of which are:

Sec. 301. (1) That every person manufacturing (a) gunpowder * * *; (b) cartridges * * *; (c) projectiles, shells, or tor-

pedoes of any kind, including shrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms * * *; (e) electric motor boats * * *; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e), shall pay for each taxable year, in addition to the income tax imposed by Title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: * * *.

SEC. 302. That in computing net profits under the provisions of this title, for the purpose of the tax there shall be allowed as deductions from the gross amount received or accrued for the taxable year from the sale or disposition of such articles manufactured within the United States the following items:

(a) The cost of raw materials entering into the manufacture; * * *.

This act was passed before our entry into the war. Subsequently, on October 3, 1917, the first war revenue act was passed (40 Stat., c. 63, pp. 300, 302), which levied an excess-profits tax ranging from 20 per cent. to 60 per cent. The munitions tax levied by the portion of the act of 1916 above quoted was reduced for the year 1917 from $12\frac{1}{2}$ per cent to 10 per cent, and it was provided that that tax should cease to be in effect after January 1, 1918. The tax now in question, therefore, was, in effect, only for the year 1916 at the rate of $12\frac{1}{2}$ per cent and for the year 1917 at the rate of 10 per cent. The particular tax involved was for the year 1916.

THE FACTS.

The business upon the net profits of which the taxes in question were collected is described in the complaint as follows:

During the year 1916 various persons or corporations who were engaged in the manufacture of projectiles in the United States contracted with the plaintiff to purchase from it certain steel, which was the raw material used by them in said manufacture, and the plaintiff contracted to supply the same in the shape of steel forgings, which were adapted as to shape, weight, and character of steel to the purchaser's requirements. (Rec., p. 6.)

It is stated in the brief for petitioner that during the year 1916 it had contracts with various projectile manufacturers, some located in the United States and some located in England, for the manufacture and sale to them of rough steel forgings; and there is in the record a contract with the British Government from which it may be inferred that the forgings furnished under that contract were to be used in projectiles manufactured abroad. But no claim is made in the complaint that the taxes collected were based at all upon forgings which did not enter into projectiles manufactured in this country, or upon the profits arising from the British contract if any forgings were, in fact, furnished under it. The complaint claims a refund only of taxes alleged to have been paid upon the profits derived from the disposition of forgings furnished and used in the manufacture of projectiles in the United States.

The furnishing of these forgings was not the selling of commodities which the petitioner had in stock. It made contracts with corporations, who were engaged in manufacturing explosive shells, to manufacture according to specifications and deliver certain quantities of rough steel forgings for shells, which were to comply with the specifications imposed by the foreign Governments with which these corporations were under contract. What the petitioner did was to take the first steps in the manufacture of the steel body of a shell from steel bars or rounds. It began its work by taking steel bars or rounds between 6 and 7 inches in diameter which it nicked and broke into lengths of 18 inches. These were then heated and put through two forging processes, by which a hole was pierced from one end to about 2 inches of the other, and the steel thus pierced was elongated by drawing through three successive rings in a hydraulic press, leaving the forgings in the shape of a cylinder open at one end and closed at the other, or roughly in proper shape for the body of a shell. In this shape they were delivered, under the petitioner's contracts. The company thus receiving them proceeded to subject them to a number of machine processes, through which they were put into the final shape of the shell body. The completed shell, when finally ready for use, consisted of six different parts: (1) The steel shell body in one piece, cylindrical in shape, with a pointed head, being the rough forging turned out by petitioner after the necessary machining had been done on it; (2) a cop-

per driving band near the base of the shell body; (3) a base plate inserted into the head of the shell; (4) a nose bushing of two parts, one of which screwed into the shell body and the other into the fuse; (5) the fuse; (6) the high explosive charge.

Petitioner's contracts called for more forgings than it could produce in its own shops. It therefore adopted three methods: (1) It made the forgings from steel rounds which it itself manufactured; (2) it made others from steel rounds which it purchased from other steel manufacturers; (3) as to still others, it purchased the steel and employed other companies to do the forging for it. Through these three methods it furnished the rough forgings called for in its separate contracts from which it derived the profits on which the tax in question was assessed.

Petitioner made its return for the year ending December 31, 1916, showing a net profit from these contracts of \$862,774.71, and on this amount it paid, without protest, a tax of \$107,846.84, which is not now in dispute.

Later, however, upon an examination of its books, its net profits were found to have, in fact, been \$1,975,861.47 more than the amount shown by its return. This additional profit consisted of two items arising from the amounts which it had deducted as the cost of raw material. In making its return, it had deducted from the gross income not the actual cost to it of manufacturing the steel used but what was conceived to be the market value of the steel bars after being manufactured. In this way, it deducted

\$754,620.88 in excess of what the steel bars had, in fact, cost. Likewise, when it contracted with other companies to do the forging work on the steel bars which it had manufactured, it included in the amount deducted as cost of raw material—not merely what the manufacture of these bars had cost but what it claimed was their market value after manufacture—and thus increased the amount deducted as cost of raw material \$1,220,740.59. These two items make up the additional profits of \$1,975,361.47, on which the tax now involved was assessed.

QUESTIONS INVOLVED.

The only questions involved are whether the petitioner was, during the year 1916, a person manufacturing unloaded shells, or any part of such shells, within the meaning of the act, and, if so, whether it is entitled to deduct from the price realized what the steel used by it actually cost, or what such steel might have been sold for in the market at the time it was used.

THE CONTENTIONS.

The petitioner contends that only a person who turns out complete and ready for use a shell, or some definite article which, without more work on it, is ready to be used as a component part of the shell, is liable for the tax.

The Government contends that where two persons, each doing a part of the work, manufacture shells or shell bodies, one conducting the manufacture up to a certain stage and the other finishing it, they are

both manufacturing the shells or shell bodies and each is liable for a tax on the profits derived by him.

The petitioner contends that if it is liable for the tax in question it is entitled in computing net profits to deduct from the gross amount received the market value of the steel bars used in the manufacture, although it may have itself manufactured them at an actual cost much below this market value.

The Government contends that the act means what it says and that petitioner was only entitled to deduct what the steel bars used actually cost it, whether they were purchased in the market or manufactured in its own shops.

BRIEF.

As shown above, the petitioner made no question as to its liability for the tax in question until it was discovered that the amount which it had reported as the profit derived was much less than the actual profit. It then, for the first time, challenged the right of the Government to collect the tax at all. Having voluntarily paid the tax shown to be due by its original return, it could not claim the return of that amount, and the present suit is therefore confined to an effort to recover the additional amount shown to be due by a true statement of its profits. It still contends that, if liable at all, it was only liable for the amount originally paid.

Petitioner was subject to the tax as a person manufacturing shell bodies.

The petitioner's primary contention is that it was not manufacturing shell bodies, within the meaning of the act of Congress, because it did not put the finishing touches upon those articles but conducted only the earlier stages of their manufacture. The case was heard and decided by the Circuit Court of Appeals at the same time that the case of *Worth Brothers Company v. Ephraim Lederer, Collector*, which is now No. 525 on the docket of this court, was heard and decided. Both cases present the question whether one manufacturer who produces the shell forgings which another, by the necessary machining, finishes into shell bodies, is liable for the tax. Both cases will be under consideration by this court at the same time. In its brief filed in cause No. 525, the Government has set forth the reasons for its contention that such a manufacturer is subject to the tax. The argument there made is submitted as equally applicable to this case. In addition, we will only reply to one or two specific contentions made in behalf of petitioner in this case.

Petitioner's own conduct shows that the Government's construction of this statute gives to the words used the sense belonging to them in the familiar language of common life and commercial business.

It is stated that revenue laws are—

designed to operate upon the public at large, and are supposed to use words in the sense

belonging to the familiar language of common life and commercial business.

There is very ready agreement upon the part of the Government with this rule as quoted by counsel. The petitioner itself has left no doubt of the result to which its application to the statute in question leads. The question is, in common life and commercial business, would this expression include only the manufacturer who happens to put the finishing touches on an article, or would it include all persons who have been engaged in the manufacture of such article at any stage of its manufacture? The petitioner is controlled and managed by officers of intelligence, who have a thorough understanding of the business in which they are engaged. In passing the act, Congress spoke to them and used language in the sense in which it was commonly understood in their business. No better test can be applied than by giving the language used the meaning which they themselves understood it to have. It appears that they understood so plainly that they were manufacturing shells, or parts of shells, that they paid taxes under this very act to the amount of more than a hundred thousand dollars, without a murmur or protest and as a matter of course. It was only when the Commissioner of Internal Revenue discovered that they had figured their profit on a basis by which they escaped the payment of some two hundred and fifty thousand dollars of taxes, for which they were liable, that any question was raised. The petition for certiorari states that the

advice of counsel was then, for the first time, asked. The result is that the construction upon which the Government insists is that which intelligent men, like petitioner's officers, engaged in that line of business themselves put upon the "familiar language of common life and commercial business" employed. On the other hand, the construction upon which petitioner now insists is one that would not occur to or be understood by such men, but which has originated only in the ingenuity of trained lawyers.

In computing net profits, the deduction on account of cost of raw materials is what they have actually cost, whether manufactured or purchased.

The tax now involved was measured by the profits derived by the petitioner from forgings manufactured from steel bars of its own production. What these bars had cost it was a sum easily ascertainable. The petitioner, however, did not see fit to claim a deduction for this amount. Instead, it conceived the idea of charging against the cost of producing the forgings what it might have sold these bars for in the market. It therefore placed upon them what it called a market value, and by deducting this it increased the amount of the deduction where the forgings had been made in its own plant \$754,620.88, and where it had employed other companies to make the forgings, using bars of its own manufacture, to the extent of \$1,220,740.59. If its original return had been accepted, it would have escaped taxation on \$1,975,881.47 of profits actually derived from its part in the manufacture of these shell bodies.

Undoubtedly, if a manufacturer of shell forgings goes into the market and buys steel bars the amount which he pays for them must be deducted as a part of the cost of production. If, however, he is equipped to make the steel, and prefers to do this, to the extent of the difference between the cost of making it and what it would cost to buy it in the market, he increases the profit which he derives from the manufacture. If he buys the bars, and is thus content to make a smaller profit, he pays a smaller tax. If he prefers to make more profit, and therefore produces his own steel, it is but fair that he pay a larger tax. Whichever method he adopts he is entitled to deduct from the price realized what his material and labor have cost him and no more. The act, in section 302, sets out the items which may be deducted, and the only one at all applicable is the item of "the cost of raw materials entering into the manufacture." This means, of course, what they have actually cost the manufacturer and not what they might have cost somebody else. If the manufacturer has purchased the materials, their cost is, of course, what he has paid for them. On the other hand, if he has manufactured them himself, it is equally plain that their cost is what it has cost him to produce them. Certainly, there is no room here for including as a deduction the profit he might have made by selling them instead of using them in the manufacture of munitions. If he chooses to deal with them commercially and sell them on the market, his profit—the difference between the cost of production and the selling price—

is a profit which he derives as a manufacturer of steel bars, and on this Congress has not seen fit to impose this tax. If, however, instead of dealing with them commercially he chooses to use them in the business which Congress has taxed, he has chosen to derive his profit from a business upon which this tax is imposed. He has his choice. If he is content with the profit that can be made by selling the bars he escapes the heavier tax, but if he finds it to his advantage to merge the untaxed profit into the large profit which may be derived from using the steel bars in the manufacture of munitions, he must follow the explicit directions of Congress and deduct only the actual cost of producing the bars.

No error in not remanding the case to the District Court.

It is now said that the Circuit Court of Appeals erred in reversing the judgment of the District Court without remanding the case for a new trial, even if the construction placed by the Circuit Court of Appeals upon the statute is correct. This seems to be predicated upon the idea that there was a mixed question of law and fact, which should be submitted to a jury. The case was, however, heard by the district judge upon petitioner's motion for peremptory instructions. There was no controverted question of fact. If the Circuit Court of Appeals was correct in its construction of the statute, the uncontested facts show that petitioner is not entitled to recover.

The only judgment rendered by the Circuit Court of Appeals was as follows:

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby reversed. (Rec., p. 171.)

Petitioner did not ask for an order remanding the case, as it might have done. Obviously, it took the view that if the Circuit Court of Appeals was correct in its construction of the statute another trial would be wholly unavailing or that the effect of a judgment merely reversing the judgment of the lower court would, without more, have the effect of remanding the cause to the District Court for a new trial. In any event the Circuit Court of Appeals can not be put in error for not making an order which it was never asked to make.

CONCLUSION.

In conclusion, it is respectfully submitted that there is no error in the judgment of the Circuit Court of Appeals and that that judgment should be affirmed.

Respectfully,

WILLIAM L. FRIERSON,
Assistant Attorney General.

DECEMBER, 1919.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

FORGED STEEL WHEEL COMPANY,
Petitioner,
vs.
C. G. LEWELLYN, Collector of Internal
Revenue for the Twenty-third
District of Pennsylvania,
Respondent.

No. —————

**PETITION OF CURTIS AND COMPANY MANU-
FACTURING COMPANY AND SUGGESTIONS
IN CONNECTION WITH ABOVE CASE.**

*To the Honorable the Justices of the Supreme Court
of the United States:*

Your petitioner respectfully shows:

That in the above-entitled cause the question involved is the construction of Section 301, Title III, of the Act of Congress of September 8th, 1916, generally known as the Munitions Manufacturers' Tax. The particular question involved was whether or not a

rough steel forging intended for use as a part of a shell was a part of a munition within the meaning of that act. The steel forging in question was not a finished product, as many more operations were necessary before the forging could be used as a part of a shell.

This exact question is involved in a claim for refund made by your petitioner herein to the Honorable George H. Moore, Collector of Internal Revenue for the Eastern District of Missouri. This claim is now pending before the Internal Revenue Commissioner in Washington and has not as yet been passed upon. The claim is for a refund of two hundred sixty thousand eight hundred sixty and 79/100 dollars (\$260,860.79), paid for the year 1916. In addition to this pending claim your petitioner also expects to file a claim for the refund of one hundred fifty-two thousand four hundred seventy-three and 06/100 dollars (\$152,473.06) against the same Collector for Munitions Manufacturers' Tax paid for the year 1917. In both of these claims exactly the same question is involved as is involved in the case presented to your Honors by Forged Steel Wheel Company above entitled.

Your petitioner is engaged in business in the City of St. Louis, Missouri. It contracted with various other concerns who were themselves engaged in furnishing shells for foreign governments, to do certain work for these concerns. Your petitioner received

steel billets which it in turn made into rough forgings. Your petitioner had no contracts to furnish shells, and the work done by it in no sense completed a part of a shell. After the rough forgings were made by it, it was necessary for the parties with whom it had contracted to do a great deal of additional work in order to make the rough forging a completed part.

In the event that your petitioner herein is denied a refund by the Commissioner of Internal Revenue it will be obliged to file suit against the Collector in the United States District Court for the Eastern District of Missouri, which is in the Eighth Judicial Circuit. It is our understanding that there are other claims of considerable amount pending in other circuits, on some of which suit has already been filed and on others of which suit will be filed in the near future. It is, therefore, apparent that not only large sums of money are involved, but the case is one of public importance because it involves the construction and operation of a revenue act under which large sums have been collected by the United States, and which has never been passed upon by this Court. If the matter can be considered now by your Honors it is apparent that at least there will be a great saving of litigation upon the particular point involved in the suit above entitled.

Wherefore, the foregoing matters being considered, your petitioner respectfully prays that the Court will

grant the prayer of the Forged Steel Wheel Company for the writ of *certiorari* to the United States Court of Appeals for the Third Circuit, and thereby avoid to your petitioner and many others, as well as to the Government, a great weight and burden of litigation.

CURTIS & COMPANY MANUFACTURING COMPANY,

By C. W. FREES,

Secretary Treasurer.

E. G. CURTIS,

NAGEL & KIRBY,

Attorneys for Petitioner.

I certify that I am attorney for and of counsel for the petitioner herein; that the allegations contained in said petition are true, and that said petition is, in my opinion, well founded in point of fact as well as law.

.....
E. G. Curtis'
.....

Attorney for Petitioner.